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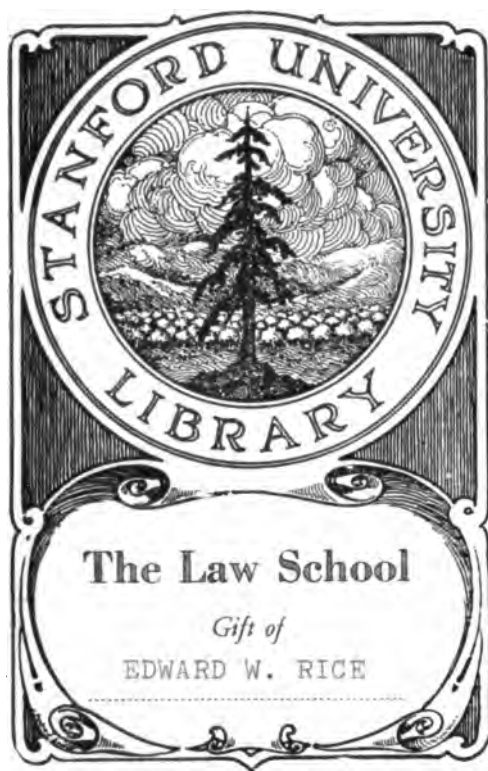
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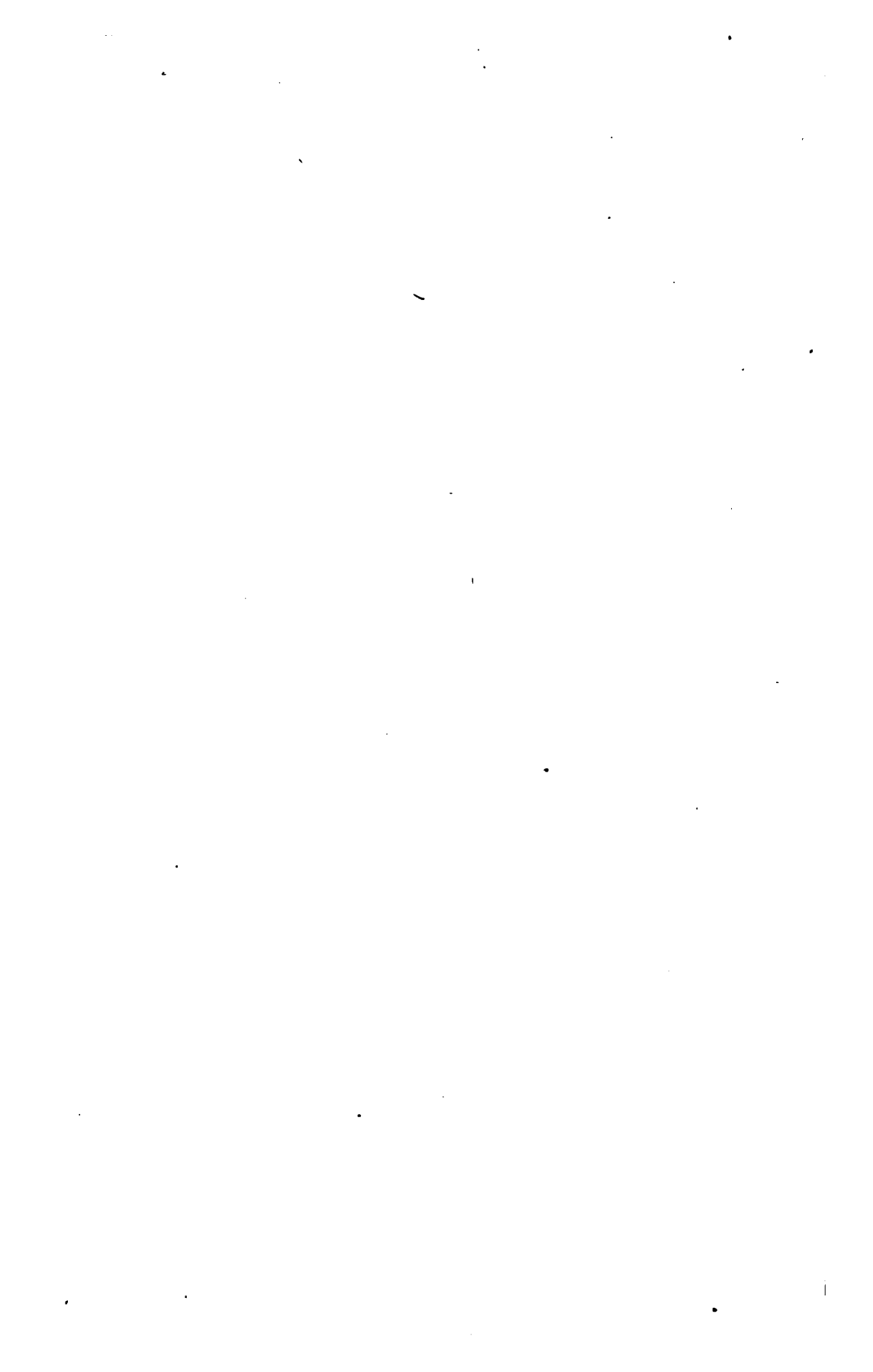


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**TREATISE**

ON THE

**LAW OF EVIDENCE.**

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*Eighth Edition.*  
*WITH CONSIDERABLE ADDITIONS.*

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**BY S. MARCH PHILLIPPS, ESQ.**

AND

**ANDREW AMOS, ESQ.**

**BARRISTER AT LAW.**

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**LONDON:**  
**SAUNDERS AND BENNING, LAW BOOKSELLERS,**  
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## ADVERTISEMENT

to

THE EIGHTH EDITION.

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THE Work, now presented to the Public, is an enlargement of the first Volume of the last Edition. It was thought most advisable to make this a separate publication, and not to connect it with the details of particular actions. The present Work, therefore, is confined to the inquiry into the general principles of our Law of Evidence; and the rules of Evidence, applicable to particular Actions, are referred to for example and illustration.

My friend Mr. Amos, who assisted me in the last Edition, took upon himself the whole charge of this, and completed the greater part of the Work, when he was prevented from finishing it, by his appointment to an office in India, in the autumn of last year. At that time, he had proceeded in the Work to the end of the Fourth Chapter of the Second Part.

On quitting England, Mr. Amos committed to Mr. Gale the charge which he had undertaken, explaining to him his own views of what remained to

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be done. Mr. Gale commenced with the Chapter, "*On the Admissibility of Parol Evidence, in explanation of Written Instruments,*" (page 710), and completed the remainder.

The chief part of my duty, in preparing this Edition, has consisted in revising and correcting, making additions and alterations, as I thought advisable. In doing this, I have bestowed all the care and attention in my power.

I ought to make some apology for the size of this Volume, which, I must admit, has far exceeded our calculation ; and yet, I doubt whether any material reduction of the size might not have lessened the usefulness and value of the Work.

S. M. PHILLIPPS.

*Whitehall,*  
*July, 1838.*

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A

T R E A T I S E

O N

T H E   L A W   O F   E V I D E N C E .

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**W**ITH a view to assist the proceedings of Courts of Justice, on questions of a fact submitted to them for their decision, the law has laid down certain rules respecting the admissibility and effect of evidence, and the order in which it should be adduced. These rules constitute the Law of Evidence, and are the subject of the present Treatise ; the object of which will be to ascertain the most convenient and surest means of arriving at truth, upon controverted questions of fact.

Object of the  
Law of Evi-  
dence, and  
plan of the  
work.

The evidence adduced before juries upon controverted questions of fact, is of two kinds, *viz.* 1st, Parol evidence, consisting of the *visa voce* examination of witnesses ; and 2ndly, Written evidence. In treating of these species of evidence, the present volume will be divided into three parts. In the first part, it is proposed to consider the subject of proof by witnesses, and the principal rules of law relative to evidence in general ; in the second part, to consider the subject of written evidence ; and in the third part, it is proposed to consider certain branches of the law of evidence, chiefly of a practical nature, such as the means of enforcing the attendance of witnesses, the order in which the evidence should be adduced, the mode in which witnesses should be examined, bills of exceptions and demurrers to evidence.

## PART THE FIRST.

### CHAPTER I.

#### OF THE EXCLUSION OF EVIDENCE IN CERTAIN CASES, AND OF INCOMPETENCY FROM DEFECT OF UNDERSTANDING.

Exclusion of  
evidence in  
general.

**T**HE parties to a suit are not permitted to adduce every description of evidence which, according to their own notions, may be supposed to elucidate the matter in dispute; if such a latitude were permitted, evidence might be often brought forward, which would lead rather to error than to truth, the attention of the jury might be diverted by the introduction of irrelevant or immaterial evidence, and the investigation might be extended to a most inconvenient length. In order to guard against these evils, the law interferes, in the first instance, by limiting and regulating the admissibility of evidence.

It is the province of the Judge presiding at the trial, to decide all questions on the admissibility of evidence; it will be for the Judge also to decide any preliminary question of fact, however intricate, the solution of which may be necessary for enabling him to determine the other question of admissibility. Upon this subject, it has been said by Mr. J. Buller, (1) that whether there is any evidence is a question for the Judge, but whether the evidence is sufficient is a question for the jury.

Exclusion of  
certain wit-  
nesses, and  
reasons of ex-  
clusion.

The law excludes various descriptions of evidence as improper to be submitted to the jury, and rejects altogether the testimony of certain persons, who are on this account termed incompetent witnesses. The rules affecting the competency of witnesses,

(1) *Carpenter's Company v. Hayward*, Doug. 375. B. N. P. 297, where the admissibility of evidence depends upon the decision of intri-

cate questions of fact, judges occasionally, in practice, take the opinion of the jury upon them.

are chiefly founded on the consideration, that, in the generality of instances, the testimony of those witnesses, whom the law deems incompetent, would mislead juries; and it is obvious that the propriety of the exclusion in each particular case must be judged of, according to the constitution of the tribunal to which the evidence is submitted, and with reference to the mode of procedure before it. For this purpose, it is necessary to refer to the difference which exists between judicial investigations and the ordinary transactions of life, more especially with regard to the space of time allowed for decision, the temptations to deceive, the facilities of deception, and the consequences of deciding incorrectly. It is true, it may happen in some particular instances, that the legal tests of incompetency may affect very slightly, if at all, the credit of a person as a witness, in their application, while there may be other grounds of objection, though not strictly legal, which would cast the strongest suspicion upon his testimony. But it is to be remembered, the established rules for the exclusion of witnesses, do not profess to be infallible tests of credibility; and further, that the propriety of the rules of evidence must be judged of by their general tendency and their general practical result.

The cases, in which a witness is deemed incompetent to give any evidence at all, are fourfold: *viz.* 1st, When the witness labours under a defect of understanding. 2d, Where he refuses to take an oath, or from defect of religious principle does not acknowledge its sanction. 3rd, Where his character is infamous in consequence of a conviction of certain crimes. And 4thly, Where he is interested in the matter in issue.

Every person, not affected by any of these objections, will be competent to give evidence. "I find no rule less comprehensive than this," said Mr. Justice Lawrence, in the case of *Jordaine v. Lashbrooke*, "that all persons are admissible witnesses, who have the use of their reason, and such religious belief as to feel the obligation of an oath, who have not been convicted of any infamous crime, and who are not influenced by interest." We shall now proceed to examine separately the several causes of incompetency, which have been mentioned.

*First, of Incompetency from Want of Understanding.*

## General rule.

Persons who have not the use of reason are from their infirmity utterly incapable of giving evidence. It is a rule, also, which we shall have occasion to consider more particularly in treating of the second ground of incompetency, that all witnesses must be examined upon oath; (1) upon this principle, persons of defective or disordered intellect, not being able to comprehend the nature and obligation of an oath, ought to be excluded; and even if the form of an oath were administered to them, no reliance could be placed on their statements. Such persons are, therefore, excluded as incompetent witnesses.

Incompetency from defect of understanding may arise, where there is a natural deficiency of the intellect, as in the case of idiots; or where the intellect has become disordered, as in the case of insane persons; or where the intellect is immature, as in the case of children.

## Natural deficiency.

An idiot is one who, from his nativity, is by a perpetual infirmity *non compos mentis*; (2) such a person is wholly incapable of giving evidence. But persons born deaf and dumb, (although it has been said that in presumption of law they are to be considered as idiots,) (3) are not on this account incompetent: and if it appear, that they have sufficient understanding and know the nature of an oath, they may give evidence by signs, through the medium of an interpreter; (4) or if they are able to write, their testimony will be taken in writing, as the more certain mode. (5)

## Disordered intellect.

Persons whose intellect have become permanently and perpetually deranged, are incompetent; but lunatics, and other persons who are afflicted with occasional fits of insanity, although

(1) *Post*, Chap. 11.(2) *Co. Lit.* 247, *a*.(3) 1 *Hale*, P. C. 34.(4) *Ruston's case*, 1 *Leach*, Cr. Ca. 455.(5) *Morrison v. Lennard*, 3 *Car. & P.* 127.

incompetent while under the influence of their malady, may yet be witnesses in their lucid intervals, if it be satisfactorily shewn that they have sufficiently recovered the use of their understandings. (1)

There is no precise age fixed, at which children are excluded from giving evidence. At one time, indeed, their age was considered as the criterion of their competency, and it was a general rule that none could be admitted under the age of nine years, very few under ten; (2) which in some cases would operate to deprive them of the protection of law against acts of violence. (3) A more reasonable rule has since been adopted, and the competency of children is now regulated, not by their age, but by the degree of understanding which they appear to possess. In *Brazier's case*, on an indictment for assaulting an infant five years old with intent to ravish her, all the judges agreed, that children of any age might be examined upon oath, if they were capable of distinguishing between good and evil, and possessed of sufficient knowledge of the nature and consequences of an oath, but that they could not in any case be examined without oath. (4) This is now the established rule, as well in criminal, as in civil cases, and it applies equally to capital offences as to offences of an inferior nature.

Immaturity of  
intellect.  
Children.

According to this rule the admissibility of children depends not merely upon their possessing a competent degree of understanding, but also, in part, upon their having received a certain share of religious instruction. A child whose intellect appears to be in other respects sufficient to enable it to give useful evidence, may, from defect of religious instruction, be wholly unable to give any account of the nature of an oath, or of the consequences of falsehood. (5) In criminal cases, where a child, who is a necessary witness for the prosecution, appears not

Religious  
instruction.

(1) *Com. Dig. Testmoigne*, A. 1.

(2) *R. v. Travers*, 2 *Stra.* 700, and cases in *East*, P. C. 442. 1 *Hale*, P. C. 302. 2 *Hale*, P. C. 278.

(3) *B. N. P.* 293.

(4) 1 *Leach*, C. C. 199. 1 *East*,

P. C. 443. *B. N. P.* 293. 4 *Bl. Com.* 214.

(5) Cases of this nature might with propriety be referred to the head of incompetency from defect of religious principle, which is the subject of the ensuing chapter.

sufficiently to understand the nature and obligation of an oath, a judge may, in the exercise of his discretion, and for the purposes of justice, postpone the trial, in order that the child may be in the mean time properly instructed. (1) But an application to postpone the trial upon this ground ought properly to be made, before the child is examined by the grand jury; at all events before the trial has commenced; for if the jury are sworn, and the prisoner is put upon his trial before the incompetency of the witness is discovered, the judge cannot discharge the jury, but should direct an acquittal. (2)

When a child from defect of understanding or instruction is unfit to be sworn, it follows as a necessary consequence, that any account, which it may have given to others, of the transaction, ought not to be admitted. On an indictment therefore for a rape on a child five years old, where the child was not examined, but an account, of what she had told her mother about three weeks after the transaction, was given in evidence by the mother, and the jury convicted the prisoner, principally as was supposed on that evidence, the judges, in a case reserved for their opinion, thought the evidence clearly inadmissible, and the prisoner was accordingly pardoned. (3)

With regard to the weight and effect of the testimony of children Sir W. Blackstone observes, (4) "that when the evidence of children is admitted, it is much to be wished, in order to render the evidence credible, that there should be some concurrent testimony of time, place, and circumstances, in order to make out the fact; and that a conviction should not be grounded on the unsupported accusation of an infant under years of discretion." In many cases, undoubtedly, the statements of children are to be received with great caution; and it may be

(1) 1 Leach, 430, n. But see *R. v. Williams*, 7 Car. & P. 320.

(2) *R. v. Wade*, 1 Ry. & Mo. C. C. 86. In this case the witness was an *adult*, possessed of sufficient intellect, but wholly without religious instruction. *Quere*, as to the exercise of the discretion of the court in postponing the trial in a case of this nature.

(3) *R. v. Tucker*, 1808, MS. See also *R. v. Brazier*, 1 East, P. C. 443. 1 Atk. 29. Ch. J. Jeffrey's examination of a child previously to being sworn, 9 How. 1148. Mr. Hume's remarks on the law of Scotland, respecting the admissibility of infants, 12 How. 559, n.

(4) 4 Com. 214.

observed, the preliminary inquiry, made with the view of ascertaining their competency, is not always of the most satisfactory nature, but is sometimes of such a description, that by a very slight discipline of the memory, a child might thus be made to appear a competent witness. The inquiry is usually confined to the ascertaining of the fact, whether the child has a conception of Divine punishment being a consequence of falsehood ; it seldom extends so far as to ascertain the child's notions of the nature of an oath, and scarcely ever relates to the legal punishment of perjury. In a recent case, however, it has been held, that the effect of the oath on the conscience of a child should arise from religious feelings of a permanent nature, and not merely from instructions confined to the nature of an oath, which have been communicated with reference to the trial. (1) Independently of the sanction of an oath, the testimony of children, after they have been subjected to cross-examination, is often entitled to as much credit as that of grown persons ; and what is wanted in the perfection of the intellectual faculties, is sometimes more than compensated by the absence of motives to deceive. It is clear that a person may be legally convicted upon such evidence alone and unsupported ; and whether the account of the child requires to be corroborated in any part, or to what extent, is a question exclusively for the jury, to be determined by them on a review of all the circumstances of the case, and especially of the manner in which the evidence of the child has been given.

## CHAPTER II.

### OF EXAMINATION UPON OATH, AND OF INCOMPETENCY FROM DEFECT OF RELIGIOUS PRINCIPLE.

It is an established rule, that all witnesses who are examined upon any trial, civil or criminal, must give their evidence under the sanction of an oath. This rule is laid down as an acknowledged proposition, by some of our earliest writers ; (2) and it appears to be of universal application, except in the few cases in which a solemn affirmation has been allowed by statute, in lieu of an oath. No exemption from this obligation can be

(1) *R. v. Williams*, 7 Car. & P. 320. (2) *Sheppard's Abridg. Tryal.*

claimed in consequence of the rank or station of a witness. A peer cannot give evidence without being sworn, (1) and the same appears to be the case in regard to the King himself. (2) The rule also holds even in the case of a judge (3), or juryman (4), who happens to be cognizant of any fact material to be communicated in the course of a trial. A striking exception to the rule formerly prevailed in the case of witnesses for persons accused of treason or felony, who were not permitted to give evidence upon oath, but this unreasonable and unjust distinction has been long since abrogated. (5) At one time it was thought that a child, who was incapable of understanding the nature of an oath, might be examined without being sworn, (6) but it is now settled, as we have seen in the preceding chapter, that the statement of a child cannot be received except upon an oath, and that where the child is incapable of understanding the nature and obligation of an oath, its testimony will be rejected. (7)

What implied  
in examination.

Import of oath.

An examination upon oath implies, that the witness should go through a ceremony of a particular import; and also that he should acknowledge the efficacy of that ceremony as an obligation to speak the truth. It has been said that, by taking an oath, a witness makes a formal and solemn appeal to the Supreme Being for the truth of the evidence which he is about to give, and imprecates the Divine vengeance on his head, if what he shall say should be false. (8)

(1) Lord Shaftesbury *v.* L. Digby, 3 Keb. 631. *R. v.* Lord Preston, 1 Salk. 278.

(2) 2 Rol. Ab. 686. In *Abigny v. Clifford*, Hob. 213, King James the First certified to the chancellor, under his sign manual, the substance of the promise made by the defendant to the King, and the certificate was admitted without objection. But *Willes, C. B.* (in *Omichund v. Barker*, *Willes' Rep.* 550,) states that, except in the preceding case, the King's certificate, under his sign manual, has always been refused.

(3) *Kel. 12*, Trial of the Regicides. See also 5 *How. St. Tr.*

1181, n. 7 *How. St. Tr.* 874, 1458. 11 *How.* 459.

(4) *Bennett v. Hundred of Hertford*, Sty. 233. *Fitzjames v. Moys*, 1 Sid. 133. *Kitchen v. Manwaring*, cit. *Andr.* 321, and see *R. v. Sutton*, 4 M. & S. 532, 537, n. 6 *How. St. Tr.* 1612, n. 18 *St. Tr.* 123.

(5) See stat. 7 W. 3, c. 3. Stat. 1 Ann. st. 2, c. 9. See 3 *Inst.* 79. 2 *Hale, P. C.* 283. 4 *Bl. Com.* 359.

(6) 1 *Hale, P. C.* 634.

(7) *Ante*, p. 5. *Brazier's case*, 1 *Leach, C. C.* 237. 1 *East, P. C.* 443.

(8) Per Lord Hardwicke, 1 *Atk.*



The particular form or ceremony of administering an oath is quite distinct from the substance of the oath itself. The substance of the oath must always be the same, though the form, in which an oath is taken, varies in different countries, and according to the different forms of religion. In England, the customary form in which an oath is administered, consists, as is well known, in calling upon the witness to declare the truth, as he may be helped by God, (1) and requiring him to touch with his right hand, and to kiss the four Gospels. If the same form of oath were required in all cases, without reference to the religious opinions of witnesses, some might refuse to comply with it from conscientious scruples, and their evidence would thus be excluded; while others might attach no binding force to the pre-

Form of oath.

49. For the definition of an oath by our old writers, Bracton, Britton, Fleta, and others, see 1 Atk. 22. By Sir E. Coke, and some other writers, an oath is often confounded with the form in which it is usually administered.

(1) The expression "So help you God," has been objected to as obscure, and as referring only to a denial of blessings without any imprecation of vengeance; and it has been thought, that the oath would be more impressive, if the form of words were repeated by the witness himself in the first person. It may also be observed, the terms of the oath appear to imply that the witness will incur greater danger of losing the Divine favour by giving false testimony, than by simple falsehood: and that the effect of this may be to diminish in his mind, in some degree, the force of the general obligation to adhere to truth on all occasions. These observations, however, apply in an equal degree to all judicial oaths, in whatever form administered; and the importance of endeavouring to enforce judicial investigations, in a more strict and uniform attention to truth, than is observed in the common transactions of life, is obvious. By the common consent of almost all nations, an oath has been adopted as one of the means of accomplishing this object. If we look to the origin of

oaths, we shall trace them to a very remote antiquity. Even in times of ignorance and barbarism, they were used in common with a number of other direct appeals to the Deity, which, in consequence of the progress of knowledge and civilization, have been long since laid aside. In those early times, oaths were in constant use, not only in judicial investigations, but upon every occasion of the least degree of importance, and as they were more frequently used, they were more grossly violated. This very lax application of oaths led to a still further abuse, by the indiscriminate introduction of them into ordinary language. We have at length become sensible of the impropriety of such unnecessary and profane appeals to the Deity. Official and extra-judicial oaths are almost entirely abolished by recent statutes; more especially, by the late act of the 5 & 6 W. 4, c. 62. Although the judicial oath has, in consequence of these improvements, become more impressive, from its comparative unfrequency of occurrence, and therefore better adapted to answer the object for which it is administered, yet its propriety and advantages have been of late frequently called in question, and many have considered, that it might be safely dispensed with. On this subject, see Mr. Erskine's remarks on Williams' trial, 26 How. 665.

scribed form, and the object of the law in requiring a religious sanction would be entirely defeated. The rule of our law, therefore, is, that witnesses may be sworn according to the peculiar ceremonies of their own religion, or in such a manner as they may consider binding on their consciences. Jews have accordingly been sworn in our Courts from a very early period, on the Pentateuch, and they take the oath with the head covered. (1) A Mahometan is sworn upon the Koran. (2) The deposition of a Gentoo has been received, who touched with his hand the foot of a Bramin. (3) A Scotch covenanter, and a member of the Kirk, have been allowed to take the oath, by holding up their hands without kissing the book; (4) and upon the same principle all persons may be sworn according to the ceremony which is sanctioned by their particular religion or sect. (5) Whatever be the form, the meaning of the oath is the same. It is an appeal to God, calling upon him to witness what we say, and invoking his vengeance, if what we say be false. (6)

The same indulgence, that is allowed in the case of different religions and sects of religion, has also been extended to the conscientious scruples of individuals, who have objected to be sworn in the manner usually adopted by persons of their own religion or sect. Thus in an old case, where a witness, who was Vice Chancellor of Oxford, refused to be sworn in the usual form by laying his right hand on the book and kissing it, Glin, C. J. ruled, that he might be sworn by having the book laid open before him and holding up his right hand. (7) "In my opinion," said the Chief Justice, "he has taken as strong an oath as any other witness." And in a late case, a witness who professed Christianity, but objected to be sworn on the

(1) 1 Atk. 40, 42. Willes, 543. Cowp. 389.

(2) Morgan's case, 1 Leach, C. C. 64, per Gold, J., delivering the opinion of all the judges. Cowp. 390. *Fachina v. Sabine*, 2 Stra. 1104.

(3) See *Omichund v. Barker*, 1 Atk. 21. In *R. v. Alsley*, O. B. Lep. 1804. Peake's Evid. 138, (5th edit.) a Chinese was sworn by dashing a saucer on the ground after he

had concluded the oath.

(4) Per Gould, J., in *Mildrone's case*, 1 Leach, C. C. 459. *Mee v. Reid*, 1 Peake, N. P. C. 22.

(5) *Omichund v. Barker*, 1 Atk. 21.

(6) *Formula jusjurandi verbis dif- fert, re convenit; hunc enim sensum habere debet, ut Deus invocetur.* Grotius, L. 2. c. 13, s. 10.

(7) *Dutton v. Colt*, 2 Sid. 6.

Gospels, was allowed to be sworn on the Old Testament, on his stating that he considered an oath so administered to be binding on his conscience. (1) A Jew who has made no formal renunciation of Judaism, but professes himself to be a Christian, may be sworn on the Gospels. (2) And in a case where a new trial was moved for, on the ground that a witness, who had been sworn on the Gospels in the usual manner, had since been discovered to be a Jew, the court of Common Pleas refused the rule, and were unanimously of opinion, that the oath taken was binding on the witness, both as a moral and religious sanction. (3)

But besides performing a ceremony of the importance just described, the law requires, that the witness should acknowledge the efficacy of such a ceremony as an obligation to speak the truth. It is therefore necessary, in order that a witness's testimony should be received, that he should believe in the existence of a God, by whom truth is enjoined and falsehood punished. Without such a belief, one sanction, which the law regards as a material security for the truth of evidence, that of the fear of Divine punishment invoked by the witness upon himself, is wanting. It is not sufficient, that a witness believes himself bound to speak the truth from a regard to character or to the common interests of society, or from a fear of the punishment which the law inflicts upon persons guilty of perjury. (4) Such motives have indeed their influence, but they are not considered as affording a sufficient safeguard for the strict observance of truth: our law, in common with the law of most civilized countries, requires the additional security afforded by the religious sanction implied by an oath, and, as a necessary consequence, rejects all witnesses who are incapable of giving this security.

Religious  
belief.

Religious  
principle.

Atheists, therefore, and such infidels, as possess not any religion that can bind their consciences to speak the truth, are excluded from being witnesses. (5) Doubts formerly existed with

(1) *Edmonds v. Rowe*, Ry. & Mo. N. P. C. 77.

(2) *R. v. Gilham*, 1 Esp. N. P. C. 285.

(3) *Sells v. Hoare*, 3 Bro. & B. 232.

(4) *Ruston's case*, 1 Leach, C. C. 455.

(5) *Bul. N. P.* 292. 1 Atk. 40, 45, 48. *Gilb. Ev.* 129.

respect to Jews, and the inhabitants of countries professing religions different from Christianity. Lord Coke says generally, that it is an objection to a witness if he be an infidel, (1) under which denomination he intended to comprise Jews as well as Heathens. (2) And Serjt. Hawkins thought, that a witness who believed in neither the New nor the Old Testament, was incompetent. (3) But Lord Hale was of a different opinion, and strongly points out the unreasonableness of excluding indiscriminately all heathens from giving evidence. (4) All doubts on this subject have long since been set at rest, and it may now be considered as an established rule, that not only Jews, but infidels of any country, believing in a God who enjoins truth and punishes falsehood, ought to be received as witnesses; (5) and they are to be sworn, as we have already seen, according to the form which is authorized by their country or religion.

Mode of ascertaining religious belief.

The only means of ascertaining the competency of a witness, with reference to religious principle, is by examining the party himself. The proper mode of examination for this purpose, it is said, is not to question the witness as to his particular opinions, but to inquire generally, whether he believes in the existence of a God and in a future state. (6) And in a case before Buller, J., where a witness, who had been sworn in the usual way, was asked, whether he believed in the Gospels on which he had been sworn, the question is said to have been overruled. But although a witness may not be questioned as to his particular religious opinions, he may be asked, whether he considers the form of administering the oath to be such as will be binding on his conscience. The proper time for putting this question is before the witness has been sworn; but if the question has been inadvertently omitted, it may be asked afterwards. (7) If, in answer, the witness state, that he considers the oath

(1) Co. Lit. 6, b.

(2) 2 Inst. 506. 3 Inst. 165. 1 Atk. 43. Willes, 541.

(3) Hawk. P. C. b. 2, c. 46, s. 148.

(4) 2 Hale, P. C. 279.

(5) See *Omuchund v. Barker*, 1 Atk. 21. 1 Wils. 84, S. C. Willes, 538, S. C.

(6) It seems, however, that an

infidel who believes in a God, and that he will reward and punish him in this world, but does not believe in a future state, may be examined upon oath. By Willes, C. B. *Omuchund v. Barker*, Willes, 550.

(7) Resolution of the Judges in the Queen's case, 2 Bro. & Bing. 284.

binding, he cannot be further asked, whether there be any other mode of swearing more binding on his conscience than that which has been used. For the witness, in stating that he considers the oath to be binding on his conscience, affirms, in effect, that in taking that oath he has called God to witness, that what he shall say will be the truth, and that he has imprecated the Divine vengeance on his head, if what he shall afterwards say should be false; and having done that, it is perfectly irrelevant and unnecessary to ask any further questions. (1)

The evidence of Quakers, and the members of other sects who refused to take a formal oath in any shape, was for a long time held inadmissible. By the stat. of the 7 & 8 W. 3, c. 34, the solemn affirmation of Quakers was admitted to have the same effect as an oath in civil cases, but they continued to be excluded from giving evidence in criminal cases, until a very recent period. This disability has now been entirely removed, by stat. 9 Geo. 4, c. 32, by which Quakers and Moravians are allowed to give evidence upon their solemn affirmation in all cases, criminal as well as civil. And by a later enactment (2) their affirmation is to be of the same force and effect as an oath in the usual form, in all cases when an oath is by law required. By another statute (3) a similar provision is made in favour of a religious sect called Separatists.

Affirmation in  
lieu of oath—  
Quakers and  
Moravians.

It was formerly laid down by writers on the law of evidence, on the authority of a dictum of Sir E. Coke, (4) that excommunicated persons were not competent witnesses, on the ground that persons excluded from the Church could not be under the influence of any religion. But this species of disability, if it ever existed, has been entirely removed by the stat. 58 Geo. 3, c. 127, s. 2, 3, which enacted, that persons excommunicated shall in no case incur any civil penalty or disability.

(1) By Lord Tenterden, C. J., 2 Br. & Bing. 284.

(2) 3 & 4 W. 4, c. 49.

(3) 3 & 4 W. 4, c. 82.

(4) 2 Bulstr. 155. Att. Gen. v Griffith. See B. N. P. 292. Gilb. Evid. 146, (3d edit.)

## CHAPTER III.

## OF INCOMPETENCY FROM INFAMY OF CHARACTER.

A third cause of incompetency is infamy of character, proceeding from conviction of certain offences.

## General rule.

The conviction of an infamous crime, followed by judgment, disqualifies a person from giving evidence in our courts of justice; (1) and persons rejected for this cause, are said to be incompetent on account of the infamy of their character. There is a distinction between infamy of character in the ordinary sense of the expression, and that legal infamy which results from the sentence of a court of justice. "If," says Sir W. Scott, (2) "a man is stigmatized by public fame only, it affects the credit of his testimony, but not his admission to the formal character of a witness." And it frequently happens, that a witness is suffered to give evidence, because not absolutely disqualified by the rule of law, though he may be far lower, in point of credit and real character, than another who is excluded as incompetent. (3) Writers on the law of evidence always distinguish between the *infamia juris*, and the *infamia facti*; the former of which may destroy the credibility of a witness, but the latter only can affect his competency.

## Distinction between legal and moral infamy of character.

(1) Our earliest writers notice this cause of disqualification. And the rule of the Roman law was similar, "*Publico judicio damnati et non in integrum restituti, admittendi non sunt ad testimonii fidem.*" Dig. l. 22, tit. 5, de Testibus, art. 3, s. 5.

(2) 2 Dods. 188, case of Ville de

Varsovie.

(3) This occasional inconsistency is the unavoidable consequence of a fixed general rule of exclusion, and of the well known principle of our law, that every man is presumed to be innocent of a crime until his guilt has been established in a court of justice.

The principle upon which this rule of exclusion is founded, has given rise to some difference of opinion, and there are not wanting authorities, which appear to rest the incompetency of such persons, as witnesses, on the ground of punishment for the offence; but it is clear that this cannot be the correct principle, for the testimony of a witness is the privilege of the party who requires it, or of the public, and not of the witness himself. Another ground, upon which this rule appears to have been established, is, that the testimony of persons convicted of infamous crimes is devoid of all presumption of credit, and would therefore be more likely to mislead than to assist in the investigation of truth in Courts of Justice. Thus, Sir W. Scott, in the judgment from which a quotation has been already made, observes that "the law considers the commission of a crime of this nature to imply such a dereliction of moral principle on the part of the witness, as carries with it the conclusion, that he would entirely disregard the obligation of an oath."<sup>(1)</sup> And C. B. Gilbert observes upon the same subject, that "the producing such a witness is perfectly ineffectual, because the credit of his oath is overbalanced by the stain of his iniquity."<sup>(2)</sup> It may be objected against the propriety of this reasoning, that it does not follow, because the moral principle of a witness has, upon a former occasion, proved too weak to resist a particular temptation of self interest, that therefore the witness ought to be accounted wholly undeserving of credit, when there may be no temptation to lead him astray, or where it may be reasonably supposed that the oath he takes, and the fear of the temporal punishment annexed to perjury, will not be without influence in causing him to adhere to the truth. <sup>(3)</sup> It may also be remarked, that there is the less danger in admitting this testimony, because the very circumstance of the conviction operates as a safeguard, by forewarning the jury to be cautious in receiving

Principle of  
the rule.

Propriety of  
exclusion.

(1) 2 Dods. Rep. 188.

(2) Gilb. Evid. 143, (4th edit.); and see per Willes, C. J. *Purdock v. Mackinder*, Willes, 667.

(3) In *R. v. Teal*, 11 East, 311. Lord Ellenborough says, "Though a person may be proved on his own

shewing, or by other evidence to have foresworn himself as to a particular fact, it does not follow that he can never afterwards feel the obligation of an oath. And in *Gilbert. Evid. 139*, it is said that "if the mother of a bastard child

the statements of the witness. The distinction between the offences, the conviction for which does, or does not, disqualify a witness, is often purely technical; whilst the modes, by which the competency of infamous witnesses may be restored, shew that the objection to such witnesses, which is capable of being removed by circumstances wholly immaterial to their credit, is not of a very substantial nature.

It is to be observed that, in practice, witnesses are rarely rejected on the ground of infamy,—in consequence of the difficulty of establishing the incompetency by producing formal evidence of the conviction and judgment, especially where there is no previous notice that the particular witness is to be produced; besides, that there are various modes by which witnesses, who have incurred this disqualification, may be restored to competency. The cross-examination of the witness, as to the fact of his previous conviction, generally produces all the effect of discrediting him, which can properly be desired.

In treating of the subject of incompetency from infamy, it is proposed, in the present chapter, to consider what offences incapacitate; what is the effect and extent of the incapacity; how incompetency from infamy of character is to be proved; and how a witness who has incurred this disability, may be restored to competency. The next chapter will treat of the evidence of accomplices, informers, and self-discrediting witnesses, a subject, connected with this branch of the law of evidence, which, from its importance, appears to deserve a separate consideration.

charge two persons, she loses her credibility;" "which," says Lord Ellenborough, "is observed with reference to the distinction between *credibility* and *competency*. But if incompetency from infamy of character proceeds on the ground of an entire want of credibility, it is not easy to understand, why there should be any distinction between the case of a witness, who has been convicted of perjury, and one who has not been convicted, but admit having committed the offence." Yet, as we shall presently see, the one is a competent and the other an incompetent witness. It is also difficult to conceive, with reference to this

principle, why the suffering of the punishment awarded by law for the offence, should occasion a restoration of competency in these cases; for although the endurance of the punishment may satisfy the ends of public justice, it is not easy to explain, how it can operate to improve the character and credit of a convict. But the true source of many of these apparent inconsistencies in the law of evidence is to be found in the disinclination of the courts in modern times to shut out evidence unnecessarily, and in their endeavours to restrain as much as possible the old rules of exclusion.



1. *What Offences Incapacitate.*

There are many offences which our law considers such blemishes on the moral character, as to incapacitate the party convicted from giving evidence. Of this kind are treason, *præmunire*, and the whole class of offences which come under the denomination of felony. (1) Petty larceny was formerly an exception to the rule which disqualifies for conviction of felony; (2) but the distinction between grand and petty larceny having been abolished, and the latter being made subject to all the incidents of the former, (3) that exception now no longer exists.

What offences incapacitate.

Treason and felony.

It has been generally laid down by writers on the law of evidence, that every species of the *crimen falsi* renders the party convicted an incompetent witness. (4) The term *crimen falsi* is one which has been imported from the Roman law into ours, and the precise extent of the signification, which it has received in our law appears to be involved in some degree of uncertainty. It is clear that a conviction for forgery will disqualify; (5) as will also all offences tending to pervert the public administration of justice, by the introduction of falsehood and fraud. Of this nature are perjury, and subornation of perjury; attaint of false verdict; (6) bribing a witness to absent himself, in order that he may not give evidence; (7) conspiring to procure the absence of a witness; (8) conspiring to accuse another person of a capital offence; (9) barrettry; (10) and other offences of a similar character. But it does not appear, that every offence, which involves the charge of falsehood or fraud, will render a witness incompetent; and in a modern case in the Admiralty

*Crimen falsi.*

Forgery—perjury.

Bribing a witness.

Conspiracy—fraud.

(1) Co. Lit. 6, b. Com. Dig. Testm. A. 5. 2 H. P. C. 277. Fortesc. Rep. 209. *Jones v. Mason*, 2 Stra. 833. *Walker v. Kearney*, 2 Stra. 1148.

(2) Stat. 31 Geo. 3, c. 35. Before this statute petty larceny disqualified, see 2 H. P. C. 277. *Pendock v. Mackinder*, Willes, 667.

(3) Stat. 7 & 8 Geo. 4, c. 29, s. 2. The consequence of incapacitating witnesses was probably not contemplated by the legislature.

(4) Bul. N. P. 291. Gilb. Evid. 141. Co. Lit. 6, b, n. 1, (Harg. edit.).

(5) 2 Hale P. C. 277. Com.

Dig. Testm. A. 5. Co. Lit. 6, b. B. N. P. 291.

(6) See authorities cited, n. b. *supra*.

(7) Adjudged in *Clancy's case*, by seven Judges, Holt, C. J., doubting at first, Fortesc. Rep. 208.

(8) *Bushell v. Barrett*, Ry. & Mo. N. P. C. 434

(9) 2 H. P. C. 277. 11 Rep. 99, a. Hawk. P. C. b. 1, c. 72, s. 9. Com. Dig. Testm. A. 5. See R. v. Crossby, 2 Leach, C. C. 496.

(10) R. v. Ford, 2 Salk, 690. B. N. P. 292.

Court, which underwent much discussion, Sir W. Scott determined, on great consideration, that a conviction for a conspiracy to commit a fraud, in raising the price of the funds by false reports, would not render an affidavit of the convicted party inadmissible. (1) Lord Tenterden also appears to have entertained the same opinion in a subsequent case, which occurred at *Nisi Prius*. (2)

#### Gaming.

A conviction for keeping a public gaming house has been thought not to render a witness incompetent. (3) But it seems that a person who has been convicted under the 9th Ann. c. 14, s. 5, of winning at the games mentioned in that statute, by fraud or ill practice, would be incapacitated; for the statute expressly enacts, that the party convicted shall be deemed infamous; and one of the legal consequences of infamy is incapacity to give evidence. (4)

#### Outlawry.

Judgment of outlawry for treason or felony has the same effect as judgment after a verdict or confession, (5) and it therefore follows, that such an outlaw cannot be a competent witness. (6) But outlawry in a personal action is no ground of exception. (7)

#### Infamous punishment.

Some kinds of *punishment* were formerly thought to be marks of infamy, and witnesses were frequently rejected after branding, or after standing in the pillory. (8) But the distinction is now clearly settled, that legal infamy arises not from the nature of the punishment, but from the nature of the offence. (9) The maxim is, *ex delicto non ex supplicio emergit infamia*. (10)

(1) Case of *Ville de Varsovie*, 2 Dods. Adm. R. 174.

(2) *Crowther v. Hopwood*, 3 Stark. N. P. C. 21.

(3) *R. v. Grant*, Ry. & Mo. N. P. C. 270, by Abbott, C. J.

(4) Co. Lit. 6, b. Fortsc. 208.

(5) 3 Inst. 212. Hawk. P. C. b. 2, c. 48, s. 22.

(6) *Celier's case*, Sir T. Raym. 369.

(7) Co. Lit. 6, b. Com. Dig.

Testm. A. 5. Hawk. P. C. b. 2, c. 48, s. 22.

(8) 2 Hale, P. C. 277. Co. Lit. 6, b. 2 Dods. Rep. 187.

(9) Gilb. Evid. 277. B. N. P. 292. *R. v. Davis*, 5 Mod. 75. *R. v. Ford*, 2 Salk. 690. *Pendock v. Mackinder*, Willes, 666. 2 Wils. 18. S. C. Fortesc. Rep. 209. *Pridle's case*, 2 Leach, 496.

(10) The various criterions of legal infamy which have been enume-

2. *Extent and Effect of Disability.*

As persons convicted of infamous offences cannot be wit- Affidavits.  
nesses, their affidavits are inadmissible in any suit or proceeding between other parties. With regard to proceedings to which they are themselves parties, it has been held that they are incapable of making affidavits as complainants; (1) but their affidavits have been received for the purpose of exculpating or defending themselves. (2) Upon the same principle, before Quakers had been made competent witnesses in criminal proceedings, their affirmations were admitted upon a criminal charge against themselves.

When a witness becomes incompetent from infamy, the effect is, for some purposes, the same as if he were dead; and if he has been attesting witness to any written instrument before conviction, proof may be given of his hand-writing. (3)

3. *Proof of Incompetency.*

Incompetency arising from conviction of an infamous crime, Judgment.  
can only be established by proof of the conviction and judgment in due course of law. The fact of the party having committed the offence cannot be proved *vidé voce*, (4) nor will even an admission by the witness himself of having been confined in a gaol

rated in the text, may, perhaps, appear to be not altogether satisfactory. With respect to perjury, it may be thought by some, that a man who, from motives of interest, has been led to violate an oath in one instance, is unfit to be trusted, even where he has no assignable motive for giving false evidence: or rather, that some latent motive ought always to be suspected, sufficient to counter-balance in his mind both the effect of the oath, and the fear of punishment for perjury, (but see per Lord Ellenborough, 11 East, 311, *ante*, p. 15, n. (3).) If, however, this should be the case in the particular crime of perjury, the reasoning is not so intelligible, with regard to many other offences. The adoption of the class of offences, falling within the technical definition of *felony*, as one of the criterions of incapacity, may be object-

ed to on the ground, that there are many offences, of a more serious description, falling under the definition of misdemeanors, which do not produce incompetency. In the present day, the distinction between several felonies and misdemeanors is purely technical. With respect to some of the particular misdemeanors, which produce incompetency, they appear distinguishable from others which have not the like effect, rather upon the ground of authority, than on any well defined principle.

(1) 1 Salk. 461. 2 Stra. 1148.

(2) Davis and Carter's case, 2 Salk. 461. Charlesworth's case, cited by the court in Walker v. Kearney, 2 Stra. 1148.

(3) Jones v. Mason, 1 Stra. 833.

(4) 1 Sid. 51.

for felony, (1) or of his having been guilty of perjury, make him incompetent, however it may affect his credit. (2) The rule, most commonly laid down, is that a *conviction* makes the witness incompetent; but it is not to be understood, that incompetency arises from the conviction alone, for that may have been quashed, on motion in arrest of judgment. (3) It is necessary to prove the judgment as well as the conviction, and this must be done in the usual way by the record or a copy. (4)

The proceedings must appear to be regular, and when they have taken place in another Court, it must appear from the record that it was a Court of competent jurisdiction. A document, purporting to be an indictment and conviction, is imperfect as a record without a caption; since the caption shews by what authority the indictment was found; and the indictment must state all circumstances essential to constitute the offence. (5)

#### 4. *Competency how restored.*

A person convicted of an infamous crime, being thus disabled from giving evidence, it remains to be considered by what means the disability may be removed.

The competency of the witness may be restored:—1st, By reversal of the judgment, or of the other proceedings producing the disqualification; 2ndly, By pardon; and 3dly, By enduring the punishment awarded for the offence.

##### 1st. *Reversal of the Judgment.*

Due proof of the judgment having been given by the party objecting to the witness, the opposite party may shew that such judgment has been reversed on a writ of error. So, if the dis-

(1) R. v. Castell Careinion, 8 East, 78.

(2) R. v. Teal, 11 East, 309. Rands v. Thomas, 5 M. & S. 244.

(3) Lee v. Gansell, Cowp. 8. Gilb. Evid. 129. Com. Dig. Testm.

A. 5. Suttan v. Bishop, 4 Bur. 2283.

(4) 8 East, 78. See *post*, Proof of Judgments.

(5) Cooke v. Maxwell, 2 Stark. N. P. C. 183.

qualification arise from outlawry for treason or felony, the reversal of the outlawry may be shewn in like manner. In a case where it was objected, that the witness had been attainted by a statute, which subjected him to the penalties of an attainder, unless he surrendered before a certain day, (which is a kind of parliamentary outlawry,) the objection was met by shewing, that the witness had surrendered conformably with the act; and a record of a proceeding, commenced on the part of the crown, and defended on the part of the witness by a plea of surrender, which the Attorney General confessed to be true, was allowed to be conclusive proof of the fact of the surrender within the limited time. (1) This however was not evidence in the nature of a reversal of the attainder, but its effect was to shew, that the penalties of the act had never been incurred by the witness.

### *2dly. Pardon.*

The competency of a witness may be restored by a pardon from the crown under the great seal. Whatever doubts were formerly entertained upon the subject, (2) it has long since been settled, that a pardon not only takes off every part of the punishment, but also clears the party from the legal disabilities of infamy resulting from his offence. (3) A pardon is said to make the witness a new creature, and to give him a new capacity; the crime may indeed be urged against him as affecting his credit, but his competency is entirely restored.

Effect of pardon.

This rule must however, as it seems, be understood subject to one qualification. A pardon will always restore competency, when the disability is a consequence of the judgment, according to the ordinary rules of law; but where the disability is annexed to the conviction of a particular offence by the express words of a statute, it is laid down that a pardon will not in such a case

(1) Lord Lovat's case, 9 St. Tr. 652, 665, fol. ed. S. C. 18 How. St. Tr. 1004, 1011.

(2) See per Lord Coke. *Brown v. Crashaw*, 2 Bulst. 154. By *Doddridge, J.*, in *Harris v. White*, Palm. 412, Latch. 81, and other dicta cited 2 Harg. Jur. Arg. 263.

(3) *Cuddington v. Wilkins*, Hob.

67, 82. *Rookwood's case*, Rep. temp. Holt, 685. 4 St. Tr. 682, fol. ed. 13 Howell's, St. Tr. 185. *Crosby's case*, Lord Raym. 39. *Lord Castlemain's case*, Sir T. Raym. 379. 2 H. P. C. 278. Com. Dig. Testm. A. 5. *Reilly's case*, Leach, 510. *Lord Warwick's case*, 13 Howell's, St. Tr. 1003.

restore competency, for the prerogative of the crown is controlled by the act of the legislature. (1) Thus, if a man be found guilty on an indictment for perjury at common law, a pardon from the crown will make him a good witness; but if he be convicted of perjury, or subornation of perjury, on the stat. 5 Eliz. c. 9, he will not be rendered competent by a pardon, for the statute expressly provides that he shall never be admitted to give evidence in any Court of Record, until the judgment be reversed.

**Proof of pardon.**

In order to prove a pardon, it must be produced under the great seal. And if the pardon is conditional, the performance of the condition ought to be shewn, (2) for on that depends all its efficacy. Thus, where the pardon is on condition of transportation for a number of years, the witness is not competent before the expiration, or other lawful determination, of the term. (3)

**Pardon under sign manual.**

Where a warrant is granted under the sign manual, countersigned by a principal Secretary of State, for a free or conditional pardon of a person convicted of felony, his discharge from custody in the case of a free pardon, and the performance of the condition in the case of a conditional pardon, will have the same effect as a pardon under the great seal, in regard to the felony for which the pardon is granted. (4)

The restoration to competency, by means of a pardon, probably proceeded on the ground of a presumption, that the pardon was granted in consequence of the error of the court, which pronounced the conviction; because as Courts of Justice are not infallible, there may be perfect innocence, notwithstanding a legal conviction of guilt. (5) Pardons are not unfrequently granted for the purpose of procuring the evidence of a witness as to some offence, which might otherwise go unpunished. Thus the crown has the power of supplying evidence, or withholding it; and convicts, in the hope of receiving a pardon,

(1) 2 H. P. C. 278. *R. v. Greepe*, 2 Salk. 514. 1 Lord Raym. 256. S. C. *R. v. Ford*, 2 Salk. 690. Crosby's case, 2 Salk. 689. B. N. P. 292. Hawk. b. 2, c. 46, s. 112. *R. v. Warden of the Fleet*, Rep. temp. Holt, 135. *Anon.* 3 Salk. 135.

(2) Hawk. b. 2, c. 37, s. 45.

(3) *Ibid.* Burridge's case, 3 P. Wms. 485. See Badcock's case, Russ. & Ry. Cr. Ca. 248.

(4) Stat. 7 & 8 G. 4, c. 28, s. 13.

(5) See Mr. Hargrave's Tract on the effect of the King's pardon for

may be tempted to exaggerate and strain their evidence. There is danger, that the course of public justice may thus be interrupted; and, in point of credibility, such a witness must be regarded in the same light (if not worse), after a pardon as before. (1) It has happened, that, for the purpose of a single prosecution, no less than five convicts have been pardoned, thus escaping the punishment due to their crimes:—whereas, if such evidence could be used without a pardon, it would be more free from suspicion, and the ends of Justice would be more effectually attained.

*3dly. Effect of enduring the Punishment for the Offence.*

The restoration of competency, by suffering the punishment awarded for the offence, depends, at the present day, upon the provisions of the stat. 9 Geo. 4, c. 32. Before the passing of this act, the endurance of the punishment in many cases operated to restore competency, but the law upon this subject was involved in some confusion, in consequence of the recent extensive changes effected in the criminal law of the country. By the 3rd sect. of this statute, after reciting that it was expedient to prevent all doubts respecting the civil rights of persons convicted of felonies, not capital, who had undergone the punishment to which they had been adjudged, it is enacted, “that where any offender, hath been, or shall be convicted of any felony, not punishable with death, and hath endured, or shall endure the punishment to which such offender hath been or shall be adjudged for the same, the punishment so endured hath and shall have the like effect and consequences as a pardon under the great seal, as to the felony whereof the offender was so convicted. Provided always, that nothing herein contained, nor the enduring of such punishment shall

Statute 9 Geo.  
4, c. 32, s. 3.

Felonies.

Perjury. 2 Hargr. Jur. Arg. and 2 Hale, 278. Crosby's case, 5 Mod. 15.

(1) This doctrine, of the restoration of a witness's credit by a pardon, appears to be of modern origin. Lord Coke, 2 Bulstr. 154, is an authority against it, and the maxim was “Pena potest tolli, culpa perennis erit.” There is considerable fluctuation of opinion upon the subject, in the trials arising out of

the Popish Plot, particularly with regard to the evidence of Dangerfield, 7 St. Tr. 296, 1054, 1083. But Lord Holt, after the Revolution, appears to have firmly established the doctrine. Crosby's case, 12 Howell's St. Tr. 1296. It was debated till 1696 in Rookwood's case, 13 Howell's St. Tr. 183. See 2 Hale, 278. 2 Salk. 690. Fitzg. 107. 1 Lord Raym. 39. Sir T. Raym. 639.

prevent or mitigate any punishment, to which the offender might otherwise be lawfully sentenced on a subsequent conviction for any other felony."

We have already seen that a pardon under the great seal operates as a complete restoration of the competency of a witness, who has been convicted of a disqualifying offence. And since the above enactment, the endurance of the punishment awarded will have precisely the same operation in all cases of felonies not capital.

**Misdemeanors.**

A separate provision is introduced in the same statute, relative to misdemeanors, by sect. 4, which is as follows: "And whereas there are certain misdemeanors, which render the parties convicted thereof incompetent witnesses, and it is expedient to restore the competency of such parties, after they have undergone the punishment; be it therefore enacted, that when any offender hath been or shall be convicted of any such misdemeanor, (except perjury or subornation of perjury,) and hath endured or shall endure the punishment to which such offender hath been or shall be adjudged for the same, such offender shall not, after the punishment so endured, be deemed to be by reason of such misdemeanor an incompetent witness in any court or proceeding, civil or criminal." This enactment expressly restores to competency, in all cases, except perjury or subornation of perjury, persons convicted of misdemeanors, after suffering the punishment awarded by their sentence.

**Endurance,  
what is.**

Questions may sometimes arise, as to what will amount to an endurance of the punishment, within the meaning of the statute.

In a case of this nature, which arose upon an enactment of a similar description in a statute now repealed, (1) where a witness had been convicted of grand larceny, and sentenced to transportation for seven years, but had been confined for that time in the hulks and then discharged; it was held, that such confinement under the sentence of transportation restored his compe-

(1) *Badcock's case*, Russ. & Ry. C. C. 248.



tency, and the judges thought that the circumstance of his having twice escaped for a few hours each time, made no difference, as he had been brought back and confined for the remainder of the term. (1)

## CHAPTER IV.

### OF THE EVIDENCE OF ACCOMPLICES, INFORMERS, AND SELF-DISCREDITING WITNESSES.

#### SECTION I.

##### *Of the Admissibility of Accomplices.*

It has been shewn in the preceding chapter, that a witness is not incompetent from infamy of character, unless a conviction and judgment are proved against him, though he may himself admit that he has been guilty of an infamous crime. And it is also a settled rule of evidence, that a witness called on a cri-

General rule.

(1) In ancient times competency was restored after conviction of any offence which admitted of benefit of clergy by purgation before the Ordinary. The stat. 18 Eliz. c. 7, s. 3, abolished purgation, and enacted, that after allowance of clergy, and burning in the hand, the offender should be forthwith delivered out of prison: and it was held upon this statute that the burning in the hand substituted for purgation, produced the same effect as purgation in restoring competency. By various subsequent statutes other punishments were substituted in lieu of burning in the hand, and it was provided that the suffering such substituted punishments should operate as a pardon, and remove all incapacities. But these enactments were confined to clergyable offences, and as the privilege of clergy, at common law, extended only to capital felonies, and not to petty larcenies or misdemeanors, persons convicted of these minor offences remained incompetent, notwithstanding they might have endured the sentence of the law. This inconvenience was in part removed by the stat. 31 Geo.

3, c. 35, which enacted, that no person should become incompetent by reason of a conviction for petty larceny. By the 7 & 8 Geo. 4, c. 28, s. 6, benefit of clergy was abolished; and by the 7 & 8 Geo. 4, c. 29, s. 2, the distinction between grand and petty larceny was abolished, and the latter made subject to all the legal incidents of the former. The alterations introduced by these enactments gave rise to the stat. 9 Geo. 4, c. 32, s. 3 and 4, the provisions of which are inserted in the text.

It does not seem clear, whether the principle of restoration to competency, by suffering a sentence, has proceeded on the ground of incompetency being in the nature of punishment, or on the ground of a regenerating effect of punishment upon the moral feelings of the offender: in either point of view, the principle is not justified by sound reasoning or by experience. On the general subject of the incompetency of witnesses from infamy, see a Treatise on the Incompetency of Witnesses by R. Whitcombe, Esq., A. D. 1824.

minal prosecution will not be incompetent, on the ground that he has been an accomplice with the prisoner at the bar, in the particular crime which forms the subject of the indictment.

Objections to evidence of accomplices.

Distinction between accomplices and other persons of infamous character. infamy and interest.

With respect to any objection that might be made against the reception of the evidence of accomplices, on the ground of the admitted infamy of their character, there appears to be no distinction between an accomplice, who acknowledges that he has participated in the commission of the crime with which the prisoner at bar stands charged, and any other witness, who admits that he has been guilty of a similar crime on a different occasion. But the testimony of an accomplice is usually given under an express, or implied promise of pardon: sometimes, in the expectation of receiving a reward on the prisoner's conviction;—and this peculiarity in the situation of an accomplice, undoubtedly, appears to furnish a much stronger ground of objection to his evidence, than exists with regard to witnesses whose conduct has been equally guilty, but who do not give their evidence from the same interested motives. It has however long since been settled, that an unconvicted accomplice is not an incompetent witness, although he may have had a promise of pardon or reward, on condition of giving evidence against the prisoner. (1)

Accomplices competent.

The evidence of accomplices has therefore been at all times admitted, and its omission has been supported on the ground of public policy, and indeed of necessity, on account of its being scarcely possible to detect conspiracies, and many of the worst crimes, without their information. In Charnock's case (2) Lord Holt, in his address to the jury, says, "Conspiracies are deeds of darkness as well as of wickedness, the discovery whereof can properly come only from the conspirators themselves; and the evidence of accomplices has been allowed good proof in all ages, and they are the most proper witnesses: for

(1) Tongue's case, Kel. 17. 1 H. P. C. 303, S. C. Laver's case, 10 St. Tr. 259. 19 How. St. Tr. 373. S. C. Hawk. P. C. b. 2, c. 46, s. 135. Willes, 423, 425. 3 Esp. 68. 4 East, 180. Say. 289.

R. v. Rookwood, 4 St. Tr. 681. (2) 4 St. Tr. 594. S. C. 12 How. 1454, referred to by Lord Ellenborough in Despard's case, 28 How. St. Tr. 488.

otherwise, it is hardly possible, if not altogether impossible, to have full proof of such secret contrivances." In answer to an objection of the prisoner, that "although an accomplice was a legal witness, he was not a good one," Lord Holt, adds, "the credit of what he says, as in all other cases, must be left to the jury, who are judges of the matter of fact, and of the credibility of witnesses."

The object of admitting the evidence of accomplices, is in order to effect the discovery and punishment of crimes, which cannot be proved against the offenders, without the aid of an accomplice's testimony. In order to prevent this entire failure of justice, recourse is had to the evidence of accomplices, and they are admitted to give evidence for the crown, either under an express promise of pardon, offered upon certain conditions by special proclamation, in the Gazette, or otherwise; or, more commonly, under an implied promise of pardon, on condition of their making a full and fair confession of the whole truth. (1) In the former case, accomplices who comply with the proposed conditions, are entitled to pardon as a matter of right; in the latter case, they have an equitable title to be recommended to mercy, on a strict and ample performance of the condition, on which they are admitted as witnesses, to the satisfaction of the presiding judge. This equitable right cannot be pleaded in bar, or be in any manner set up as a legal defence to an indictment against them for the same offences with respect to which they have appeared as witnesses against others, though it may be made the ground of a motion for putting off their trial, in order to allow time for an application to the proper quarter. (2) With regard to other offences with which the prisoner at the bar is not charged, an accomplice can derive no advantage from such equitable claim to a pardon: the claim must be considered as limited to the particular offence, for the prosecution of which his testimony is admitted. (3)

Object of admitting accomplices.

Express or implied promise of pardon.

Equitable claim to pardon, effect of.

(1) See *Rudd's case*, Cowp. 339. The practice of admitting the evidence of accomplices appears to have arisen from the ancient doctrine of approvement which has been long since obsolete. See as

to *Approvement*, 2 Hale, P. C. 227, c. 29. Cowp. Rep. 335.

(2) *Rudd's case*, Cowp. 339.

(3) *Lee's case*, Russ. & Ry. Cro. Car. 361. *Brunton's case*, Russ. & Ry. 454. It is entirely in the dis-

Practice, as to  
admitting  
accomplices.  
Separate in-  
dictment.

If an accomplice is himself separately indicted for the same offence, this will not affect his competency before conviction; (1) and even after conviction he is not incompetent, unless judgment has been passed upon him; for it is not the conviction but the judgment, that creates the disability.

Accomplices  
jointly indicted.

It is not a matter of course, to admit a person charged with the commission of a crime, as a witness against his associates, not even after he has been allowed to give evidence before the committing magistrate; but if his evidence is deemed to be absolutely necessary in support of the prosecution, the proper course is to apply to the court, for permission to send him as a witness before the grand jury; and it is in the discretion of the judge, under all the circumstances of the case, whether he will grant or refuse an order. (2) Where it is intended to make this application, the accomplice ought not to be included in the indictment; but where he has been included with his confederates in a joint indictment, he may still be used as a witness in some cases with the consent of the court. (3) Thus, in a prosecution for a conspiracy, a verdict of acquittal may be taken against some of the defendants before the opening of the case; and the defendants so acquitted may be called as witnesses for the prosecution. (4) And there seems to be no objection to the same course being adopted, with the permission of the court, in cases of felony. So also, if an accomplice, who is jointly indicted with others plead guilty, and is fined by the court, and pays the fine, (in a case where such fine may be imposed by way of punishment, and where the suf-

cretion of the judge in these cases, whether he will recommend the accomplice to mercy. S. C. As the accomplice is entitled to no protection in respect to other offences, he is not bound to answer questions relative to such offences on his cross-examination; *West's case*, O. B. Sessions, 1821. See *post*, Examination of Witnesses. It is not usual to admit accomplices who are charged with other felonies.

(1) *Case of Bilbou and others*, 2 H. P. C. 279. 1 H. P. C. 305. *Gunston and Downs*, 2 Rol. Abr. 685, pl. 3. *Hawk. b. 2, c. 46, s. 99*. *Gilb. Evid.* 118. *Bath v. Montague*, cit. *Fortsc. Rep.* 247. It was formerly thought,

from analogy to the ancient doctrine of approvement, that an accomplice separately indicted for the same offence, could not give evidence against the others, unless he had first pleaded guilty to the indictment against him; *Sir P. Cresby's case*, 1 Hal. P. C. 303.

(2) It is usual for the judge to grant the application on the representation of the counsel for the prosecution, that the evidence would otherwise be insufficient to substantiate the charge.

(3) See *infra*, competency of parties to the suit.

(4) *R. v. Rowland*, Ry. & Mo. N. P. C. 401.

fering the punishment restores competency) he may be called as a witness against the other prisoners.(1)

If an accomplice, after having confessed the crime, and after having been received as a witness against his associates, breaks the condition on which he has been admitted, by refusing to give full and fair information, the court may direct a bill to be presented forthwith to the grand jury against him; or, if they are discharged, may commit him to prison, and he may be tried and convicted on his own confession.(2)

Breach of contract.

On the trial of a person for a misdemeanor in receiving stolen goods, under the repealed statute, (22 Geo. 3, c. 58,) which authorized proceedings against the accessory, notwithstanding the principal felon might not have been convicted, or might not be amenable to justice, the party who had committed the theft, but had not been convicted, was held to be a competent witness for the prosecution,(3) and the same doctrine would be applicable to the case of a receiver, prosecuted for a substantive felony under the provisions of the statute now in force on this subject.(4)

Principal and accessory.

As the infamy of an accomplice's character does not render him an incompetent witness for the prosecution, it follows, upon the same principle, that he will be also a competent witness on behalf of the prisoner, notwithstanding he may be himself charged on a separate indictment, unless he has been actually convicted and sentenced.(5) And upon a joint indictment against several prisoners, when there is either no evidence whatever, or very slight evidence against one of them, the

Accomplice admissible for prisoner.

(1) A witness so circumstanced is competent for the other defendants, see *R. v. Fletcher*, 1 Stra. 633, (*post*, competency of parties to suit,) and the principle is the same in regard to his competency for the prosecution.

(2) *R. v. Burley*, 2 Stark. Evid. (2 edit.) 12 n. (r).

(3) *Haslam's case*, 1 Leach, Cr. Ca. 467. *Price's case*, *ibid.* 468, n. (1). *Patram's case*, 2 East,

P. C. 782. So also it was decided that on an indictment on the stat. 4 G. 1, c. 11, for taking a reward to help to the discovery of stolen goods, the principal who had not been convicted might be called as a witness; *Wild's case*, 2 East, P. C. 782. See 7 & 8 Geo. 4, c. 29, s. 58.

(4) 7 & 8 Geo. 4, c. 29, s. 54.

(5) 2 Hale, P. C. 280. 2 Roll. Abr. 685. *Fortesc.* 246.

court, in the exercise of its discretion, sometimes will direct a verdict to be given for him, and, upon his acquittal, admit him as a witness for the other prisoners. (1) In such a case, however, the witness stands wholly absolved from the charge, and can no longer be considered in the light of an accomplice.

## SECTION II.

*Of the Confirmation of Accomplices.*

Accomplice  
not corroborated.

Since accomplices are competent witnesses, it appears to follow as a necessary consequence, that if their testimony is believed by the jury, a prisoner may be legally convicted upon it, though it be unconfirmed by any other evidence. It is the peculiar province of the jury to determine upon the degree of credit to be attached to any competent evidence submitted to their consideration; and it has accordingly been laid down in many cases as a settled rule, that a conviction obtained upon the unsupported testimony of an accomplice is strictly legal. (2)

Practice requiring corroboration.

But great injustice would result, if it were the practice of juries to convict upon the unsupported evidence of accomplices, whose testimony, though admitted from necessity, ought always to be received with great jealousy and caution. For upon their own confession they stand contaminated with guilt; they admit a participation in the very crime, which they endeavour by their evidence to fix upon the prisoner; they are sometimes entitled to reward upon obtaining a conviction, and always expect to earn a pardon. Accomplices are therefore of tainted character, giving their testimony under the strongest motives to deceive; and a jury would not in general be justified, in giving to such witnesses credit for a conscientious regard to the obligation of an oath. Sometimes they may be tempted to accuse a party who is wholly innocent, in order to screen themselves or a guilty associate; and if the

(1) 2 Hawk. P. C. c. 46, s. 98. R. v. Bidder, 1 Sid. 237. See *post*, competency of parties to the suit.

(2) R. v. Atwood, Leach, Cr. Ca. 521. 7 T. R. 609. R. v. Durham, Leach, Cr. Ca. 538. 1 Hale, P. C.

303. See per Lord Ellenborough, R. v. Jones, 2 Campb. 132. 31 Howell's St. Tr. 325. 7 T. R. 609, S. P. Per Lord Denman, 7 C. & P. 152, and per Alderson, 7 C. & P. 273.

prisoner has been their participator in crime, they may be disposed to colour and exaggerate their statement against him, with a view to hide their own infamy, or, by obtaining his conviction, to protect themselves from his vengeance, and secure the expected benefit (1). The doctrine, therefore, of a legal conviction upon the unsupported evidence of an accomplice, has been greatly modified in substance and effect; and it has long been considered, as a general rule of practice, that the testimony of an accomplice ought to receive confirmation, and that, unless it be corroborated in some material part by unimpeachable evidence, the presiding judge ought to advise the jury to acquit the prisoner. (2)

It has been laid down, that the practice, of requiring some confirmation of an accomplice's evidence, must be considered in strictness as resting only upon the discre-

Nature and foundation of the practice.

(1) See Lord Hale's remarks on Tongues' case, 1 Hale, P. C. 304. In the earlier state trials the protection and countenance afforded by the courts to accomplices, spies, and informers was often carried to great lengths; and prisoners were sometimes tauntingly asked, whether they thought the king would bribe his witnesses; see Langhorne's case, 7 St. Tr. 446. The language of Lord Holt, in the trials for the Assassination Plot, may probably be thought, at the present day, too favourable towards accomplices; see particularly Charnock's case, 12 How. St. Tr. 1454. The exordium of Lord Howard to his evidence in Algernon Sidney's case, is a curious specimen of the hypocrisy of an accomplice.

(2) See the cases collected and stated in the text, *infra, et seq.* On the subject of the Evidence of Accomplices, see a tract by the present Lord Chief Baron of Ireland, published in 1836, which contains an elaborate examination into the origin and history of this practice. According to the view of this learned writer, the practice of requiring confirmation cannot be traced back more than half a century. And he

observes, that in the earlier cases which have been referred to as authorities for the practice, nothing can be found which leads to the inference of any general regulation on the subject, and that the credibility of an accomplice, whether confirmed or unconfirmed, appears to have been treated as a question for the jury. See Tongue's case, 6 How. St. Tr. 226, per Sir O. Bridgman. 1 Hale, P. C. 334. See also *R. v. Charnock*, 12 How. St. Tr. 1454. In this case almost the only material witnesses were accomplices. The observations of Lord Holt, as to their competency have been cited in the text, *ante*, p. 27, (and they were said by Lord Ellenborough, in *R. v. Despard*, to comprise in a few words the good sense and sound law on the subject.) In *R. v. Rudd*, Cowp. 339, Lord Mansfield says, "the single testimony of an accomplice is *seldom* of sufficient weight with the jury to convict the offender. The subsequent cases are stated in the text, *post*. The practice of requiring confirmation has been stated not to extend to misdemeanors. See per Gibbs, Att. Gen., *R. v. Jones*, 31 How. St. Tr. 315.

Depends on discretion of judge, not a strict rule of law.

tion of the presiding judge. (1) And this, indeed, appears to be the only mode, in which it can be made reconcileable with the doctrine already stated, that a *legal* conviction may take place upon the unsupported evidence of an accomplice. But it may be observed, that the practice in question has obtained so much sanction from legal authority, that a deviation from it on the part of a judge, in any particular case, would, at the present day appear singular and of questionable propriety. Although the judge does not in express language, declare, that a case depending on the unconfirmed evidence of an accomplice, is insufficient in law to warrant a conviction, but merely *advises the jury* not to place credit on the evidence; yet, as it is not likely an instance should arise, in which the jury would disregard the advice so given, and convict the prisoner, the substantial result appears to be nearly the same, as if the practice had depended upon a rule of law, instead of being the exercise of the discretion of the presiding judge. The only distinction appears to be, that if the judge were to submit a case of this nature to the jury without any such recommendation, and a conviction ensued,—or if a jury were to convict in opposition to the recommendation of the judge, it could not properly be said in either case, consistently with the authorities on the subject, that the conviction would be illegal.

Extent of corroboration.

From the anomalous nature of the rule of practice requiring confirmation, more especially from the circumstance that it is considered in law to rest merely upon the discretion of the presiding judge, and that it appears in fact to have originated in the exercise of such discretion, it might be expected, that some difference of opinion would arise as to the nature and extent of the necessary confirmation. It is clearly unnecessary

Confirmation of some material part sufficient.

that the accomplice should be confirmed in *every circumstance* which he details in evidence; for there would be no occasion to use him at all as a witness, if his narrative could be completely proved by other evidence free from all suspicion. (2) The rule

(1) See per Lord Ellenborough, *R. v. Jones*, 2 Campb. 132.

(2) See report of the Trials at

York, on Special Commission, 1813, pp. 16, 17, 50, 150, 165, 201.



rule upon the subject which has generally been laid down is, that if the jury are satisfied, that he speaks truth in some material part of his testimony, in which they see him confirmed by unimpeachable evidence, this may be a ground for their believing, that he also speaks truth in other parts, as to which there may be no confirmation. (1) So far all the authorities agree; but the point, upon which a difference of opinion and of practice appears to have prevailed, is as to the particular part or parts of the accomplice's testimony, which ought to be confirmed.

In some cases it has been considered, that the confirmation ought to be such as affects the *person of the prisoner*, and connects him directly with the crime; but in other cases this description of confirmation has been considered unnecessary, and it has been held, that confirmation of the accomplice in other parts of his testimony, which do not affect the identity of the prisoner, may be sufficient to entitle the accomplice to credit, and to warrant the judge in leaving the case to the jury without a recommendation to acquit.

Confirmation  
as to identity of  
prisoner.

In the first case, in which this question appears to have been expressly raised, two prisoners had been convicted on the evidence of an accomplice, who was confirmed as to the circumstances attending the offence, but not as to the identity of the prisoners, and the judges were unanimously of opinion, that the conviction was good, upon the general ground already mentioned; namely, that a prisoner may legally be convicted upon the unconfirmed evidence of an accomplice. (2) In a case occurring shortly afterwards, a similar decision took place, and, as it appears, on the same ground. At the trial the court observed, that the practice of rejecting an unsupported accomplice was rather a matter of discretion with the judge, than a rule of law; and the case having been left to the jury, and the prisoner convicted,

Authorities.

particularly the charges of Thompson, C. B., in *R. v. Swallow*, and of Le Blanc, J., in *R. v. Mellor*.

(1) See authorities cited in the preceding note, and Despard's case, 28 How. St. Tr. 488, and

per Lord Ellenborough, 31 How. St. Tr. 325. *R. v. Barnard*, 1 Car. & P. 88.

(2) *R. v. Atwood*, Leach, C. C. 521. 7 T. R. 609, cited *ante*.

the judges afterwards held the conviction good. (1) The same general doctrine was subsequently laid down in the case of *R. v. Jones* (2) by Lord Ellenborough, who there referred to a case, in which the judges were of opinion, that four prisoners had been properly convicted upon the testimony of an accomplice, whose evidence had been confirmed as to three of the prisoners, but not as to the fourth. And in the report of the York Trials under a special commission, it is laid down by C. B. Thompson, that "confirmation need not be of circumstances which go to prove, that the accomplice speaks truth with respect to *all the prisoners*, (when several are tried,) and with respect to the share they have each taken in the transaction; for if the jury are satisfied, that he speaks truth in those parts in which they see unimpeachable evidence brought to confirm him, that is a ground for them to believe that he speaks also truly with regard to the *other prisoners*, as to whom there may be no confirmation." (3) Again, in a later case, where an accomplice was confirmed as to one of several prisoners jointly indicted, but not as to the others, Bayley, J., told the jury, that if they were satisfied from the confirmation, that the accomplice was a credible witness, they might act on his testimony with respect to the prisoners, as to whom he had not been confirmed, and they were convicted. (4) In Birkett's case, (5) on a case reserved, the judges were of opinion, that an accomplice did not require confirmation as to *the person* charged by him, if he were confirmed in the other particulars of his statement. And in a very recent case at the Old Bailey, before Lord Denman, Mr. Justice Park, and Mr. Baron Alderson, when the counsel for the prosecution stated, that he should not be able to confirm an accomplice, who was to be called as a witness, with regard to the persons of the prisoners, but only as

(1) *R. v. Durham*, Leach, C. C. 538. It was, however, said in this case that the witness (a receiver) was rather an accessory after the fact than an accomplice in the fact. In *R. v. Smith* and another, reported in a note to the last case, where the only witness affecting the prisoners was an accomplice, the Court admitted the rule of law, that the uncorroborated testimony of an accomplice was legal evidence, but

thought it too dangerous to suffer a conviction to take place on such testimony, and the prisoners were acquitted.

(2) 2 Campb. 132. 31 How. St. Tr. 325.

(3) *R. v. Swallow*, How. St. Tr. 971.

(4) *R. v. Dawbar*, 3 Stark. N. P. C. 34, and see *R. v. Barnard*, 1 Car. & P. 88. Per Hullock, B.

(5) *Russell & R.*, C. C. 252.

to the general circumstances of the case, Lord Denman said, he considered, and he believed his learned brothers concurred with him, that it was altogether for the jury, who might, if they pleased, act on the evidence of the accomplice without confirmation; but observed, that a person so situated, would not be likely to receive any great degree of credit. (1)

The authorities, above stated, appear to shew, as it has been before observed, that the rule, which requires some confirmation of an accomplice to be given, is to be considered not as a strict rule of law, but as a practice depending on the discretion of the presiding judge. And these authorities also shew, that judges, in the exercise of their discretion, have generally, if not always, considered that some confirmation ought to be given, but have not considered evidence, affecting the identity of the prisoners charged, to be essential for the purpose of confirmation.

Result of  
authorities  
above stated.

On the other hand, there are several recent decisions, in which judges, in the exercise of their discretion, have thought that confirmatory evidence of identity ought to be given.

Recent deci-  
sions.

Thus in the case of *R. v. Addis*, (2) an accomplice, who was the principal witness, was corroborated as to collateral facts, none of which tended to connect the prisoner with the accomplice, or with the transaction: Mr. Justice Patteson observed, that the corroboration ought to be as to some fact or facts, the truth or falsehood of which would go to prove or disprove the offence charged against the prisoner. And in a subsequent case, (3) where it was proposed on the part of the prosecution, to confirm the accomplice as to the mode, in which the felony was committed, Mr. Justice Williams said, that something ought to be proved

(1) *R. v. Hastings*, 7 Car. & P. 152. In this case, the evidence for the prosecution was gone into, after the statement that confirmation could not be given as to the persons of the prisoners: but the prisoners were acquitted, the subsequent evidence being contradictory,

rather than confirmatory of the accomplice.

(2) 6 Car. & P. 388.

(3) 6 Car. & P. 595. *R. v. Webb*. See the observation of C. B. Joy, on this and the preceding case.—Preface, p. 111.

which would tend to bring the matter home to the prisoners, and that confirming the accomplice as to the mode, in which the felony had been committed, was not enough to entitle his evidence to credit so as to affect other persons; that in fact this would be no confirmation at all, since every one would give credit, to a man avowing himself a principal felon, for at least knowing how the felony was committed. In a later case, on an indictment against two persons, the same doctrine was laid down by Mr. Baron Alderson, (1) who pointed out the distinction between confirmation as to the circumstances of the felony, and confirmation affecting the individuals charged; the former only proves that the accomplice was present at the commission of the offence; the latter shews that the prisoner was connected with it. In summing up, the Judge observed, that confirmation merely as to the circumstances of the felony, was really no confirmation at all; that it was true, the jury might legally convict on the evidence of an accomplice only, if they could safely rely on his testimony, but that he always advised juries not to act on the evidence of the accomplice, unless confirmed as to the particular person charged with the offence. After advert- ing to the facts of the case, as affecting the two prisoners, the same Judge stated to the jury, that if they thought the accomplice was not sufficiently confirmed as to one, they would acquit that one, and that if they thought he was confirmed as to neither, they would acquit both. In another case, (2) where a thief and receiver were jointly indicted, the same learned judge expressed his opinion, that confirmation as to the thief did not advance the case against the receiver. And in a former case of a similar description, where there was a slight confirmation as to the receiver, but none as to the principal felon, Littledale, J., thought the case failed altogether, and that the accomplice ought to be confirmed as to the principal, before the jury could be asked to believe the witness's testimony. (3)

(1) *R. v. Wilkes*, 7 Car. & P. 272.

(2) *R. v. Moores*, 7 Car. & P. 270.

(3) *R. v. Wells*, Mood. & Ma. N. P. C. 326, the ground of this

decision appears to have been, that it was necessary to establish the guilt of the principal by confirming the accomplice as to him, before the question of the guilt of the receiver could arise.

From the class of cases which have been last cited, it will appear, that the recent practice of several judges, in exercising their discretion as to the evidence that ought to be adduced, in order to entitle an accomplice to credit, has been to require a confirmation upon some point affecting the person of the prisoner charged: and that when several prisoners are jointly tried, confirmation is to be required as to all of them, before all can be safely convicted. Indeed, it would be difficult to assign a satisfactory ground for requiring confirmation as to the person of a prisoner indicted alone, and dispensing with confirmation as to prisoners jointly indicted: the same reasons, which render confirmation necessary in the former case, appear to require it in the latter; if a distinction between the two cases were to be allowed, a prisoner's acquittal or conviction, upon an accomplice's testimony, might depend upon the mere accident, of his being indicted alone, or jointly with others. It will be observed, that it is still laid down by judges, even when calling for this personal confirmation, that the jury, if they think proper, may legally convict upon an accomplice's testimony unsupported; and that, in the absence of such evidence, they do not withdraw the case from the jury, but only advise them not to give credit to the accomplice.

Result of these cases.

Whether the rule of practice, which, as we have seen, has been recently followed, will be adopted as a general rule, by which all judges will consider themselves bound, may perhaps not be wholly free from doubt, but the weight of the later authorities appears to be in favour of such a rule. The distinction between confirmation as to the manner, in which an offence was committed, and as to the parties, by whom it was committed, is of obvious importance: and although cases may sometimes arise, in which, from the confirmation of an accomplice as to the circumstances attending the commission of the crime, a jury may be led to conclude, that the accomplice speaks truth with regard to the person charged, still, as the two points are, in general, essentially different, great caution is to be used in drawing such a conclusion. If the witness has really been an accomplice, as he states himself to

Distinction between confirmation, as to the circumstances, and as to the person.

be, he must be acquainted with the manner in which the offence was committed; and, in describing the manner, it would not in general be the interest or the desire of an accomplice to swear falsely. But, with respect to persons concerned, there may be strong reason to infer the existence of motives, which would induce an accomplice to fabricate or pervert some facts against a party charged, notwithstanding that other facts, related by him, may be indisputably true, or even notwithstanding the general consistency of his story may be clearly established. (1)

Confirmation  
by whom.

Several accom-  
plices.

It appears that the practice of requiring confirmation, when the case for the prosecution is supported by an accomplice, applies equally, when two or more accomplices are brought forward against a prisoner. In a case in which two accomplices spoke distinctly to the prisoner's guilt, Mr. Justice Littledale told the jury, that, if their statement were the only evidence against him, he could not advise them to convict; observing, that it was not usual to convict on the evidence of one accomplice without confirmation, and that, in his opinion, it made no difference, whether there were more accomplices than one. (2)

(1) This subject, which has been treated at considerable length in the text, on account of its interest and importance, has created much difference of opinion at the Irish bar. See an anonymous pamphlet by an Irish barrister, Dublin, 1824; the object of which is to prove, that some evidence of personal identity ought to be given in all cases. And see the tract of C. B. Joy, before referred to, which, though only recently published, was written some years ago, in answer to the former pamphlet. The Lord Chief Baron considers, that the rule of practice, requiring confirmation, may be satisfied by corroborating parts of the accomplices' evidence, not affecting the persons of the prisoners. In the preface, the learned writer states, that he was induced to publish his treatise in consequence of the cases of *R. v.*

*Addis*, and *R. v. Webb*, cited *ante*, p. 35. But the subsequent cases, to the same effect, were probably not published, when the tract of the Chief Baron appeared; they are not referred to by him, neither does he allude to the previous case of *R. v. Wells*, Mo. & Ma. 326. *ante*, p. 36.

(2) *R. v. Noakes*, 5 Car. & P. 326. O. B. cor. Littledale, J., Bolland, J., and Alderson, J. In the work of C. B. Joy, p. 100, *et seq.* the learned writer expresses a strong opinion, adverse to the course pursued in the above case. He does not, however, refer to the case, but on the contrary states, that the question had not undergone consideration. *R. v. Noakes* was decided in 1832, after the learned C. Baron's work was written, but some years before its publication. The C. Baron refers to

It appears to have been held, in a late case, that a confirmation by the wife of an accomplice would be insufficient: it was said, that the wife and the accomplice must be considered as one for this purpose. (1)

Wife of accomplice.

In another recent case, in which the prisoner was indicted for manslaughter at a fight, it was objected, that all persons, who had been present, were principals in the second degree, and that their evidence ought to receive confirmation as in the case of accomplices, but Mr. Justice Patteson was of opinion, that they were not such accomplices as would require any further evidence to confirm them. (2)

Accomplices, who are.

### SECTION III.

#### *Evidence of Informers, and Self-discrediting Witnesses.*

There is another class of witnesses, who cannot properly be considered as coming within the description of accomplices, or as partaking of their criminal contamination; namely, persons, who have entered into communication with conspirators, with an original purpose of discovering their secret designs, and of disclosing them for the benefit of the public. (3) The existence of such original purpose on their part is best evinced by a conduct, which precludes them from wavering or swerving from the

1. Informers.

the speeches of the Solicitor General and Mr. Serjeant Best, in *R. v. Despard*, 28 How. St. Tr. 428. See on this subject the observations of the writer of the anonymous pamphlet upon accomplices before referred to, as to the trial of the incendiaries of Wildgoose Lodge, Dundalk. Spring Ass. 1818, where a house with its inmates was destroyed by fire by upwards of a hundred persons, marching in three parties from distant points not connected with each other, and the accomplices were selected from the different parties. And, further, on the general subject, see Sir T. Witherington's argument, 5 How. 176. Discussion in Sayer's case,

16 How. 158. Sir R. Atkyn's remarks, 9 How. 721, as to the evidence of an indicted accomplice. Murphy's case, 19 How. 702. Sir J. Copley's remarks in Watson's case, 32 How. 513. Lord Ellenborough's charge in Watson's case, 32 How. 583. Lord Tenterden's charge in the cases of the Cato-street Conspiracy, 33 How. 689.

(1) *R. v. Neale*, 7 Car. & P. 168, per Park, J.

(2) *R. v. Hargraves*, 5 Car. & P. p. 170; and see the cases referred to in sect. 3, *supra*.

(3) Part of Lord Ellenborough's address to the jury in Despard's case, 28 Howell's St. Tr. 489.

discharge of their duty, if they might otherwise be disposed so to do; as, when the witness voluntarily makes an early disclosure, and thenceforth acts in pursuance of directions given to him, as to the part which he is to bear in the general confederacy. Such a witness is not to be considered in the light of an accomplice, although perhaps, on other grounds, no small degree of prejudice or disfavour may attach to him; for certainly, no man of honour or right feeling would continue to associate with his companions, apparently forwarding the purposes of a conspiracy, with the intention afterwards of betraying, and giving them up to justice. Whatever may be the merit or demerit of this species of conduct on other grounds, such a witness is not, strictly speaking, an accomplice. (1) In prosecutions under the laws against coining and uttering counterfeit money, the proof of the offence often rests in a great measure on the testimony of some person, employed by the agents of the mint for the purpose of obtaining the counterfeit coin under feigned pretences. This testimony is usually supported, and very properly, in some material facts, by other unimpeachable evidence.

The objection to the competency of informers, on the ground of being entitled to a penalty on the conviction of the offender, against whom they give information, will be considered in another part of this work.

2. Witness  
alleging his  
own dis-  
honesty.

Mr. Justice Lawrence observes, (2) that the constant practice of examining accomplices shews, that the mere circumstance of a man's having represented himself as having done things inconsistent with common honesty, is not sufficient to reject his testimony, however it may weaken and impeach it. The maxim of the civil law, *nemo allegans suam turpitudinem est audiendus*, would not admit of such a practice. But this maxim is of a nature so exclusive in it's operation, and at the same time so vague and undefined, that our Courts of law have properly rejected it as a rule of evidence.

(1) See 26 Howell's St. Tr. 489. T. R. 601.

(2) *Jordaine v. Lashbrooke*, 7



In the case of *Walton v. Shelley* (1), indeed, which was an action upon a bond, given by the defendant in consideration of the plaintiff's delivering up certain promissory notes, the Court of King's Bench held, that the indorser of one of the notes ought not to be allowed to prove the consideration of the note usurious, on a supposed principle of public policy, that no party who has signed a paper or deed, and has, by his signature, given it credit, shall ever be permitted to give testimony to invalidate that instrument. This appears to have been the first case in support of such a rule : but the contrary principle seems now to be fully established.

Witness in-  
validating an in-  
strument.

Indorser.

In the later case of *Jordaine v. Lashbrooke*, (2) this subject was very fully discussed ; and the court there determined, that in an action on a bill of exchange against the acceptor, the payee, who was also indorser, was a competent witness for the defendant, to prove that the bill, which was unstamped, and purported to be drawn at Hamburgh, was, in fact, drawn in London, and therefore void for the want of a stamp. Nor is there any distinction with respect to negotiable securities, when the point to be considered is the competency of the witness : for supposing what he has done, in putting such instruments into circulation, to be ever so great a fraud and ever so mischievous, he still is a witness unconvicted of any crime, and without interest, and not more devoid of principle than many who have been mentioned as constantly admitted. (3) And this rule applies to all cases, civil as well as criminal, in which a witness's character is open to objection from the turpitude or impropriety of his conduct. Thus in an action under the statute 2 Geo. 2, c. 24, for bribery at an election, a person who has received a bribe may be a competent witness against the defendant. (4) And one who has set his name as sub-

Payee.

Person bribed.

(1) 1 T. R. 296. "Testes qui adversus fidem suam testationis vacillant, audiendi non sunt," was the maxim of the civil law. Domat. book 3, tit. 3, sect. 6, art. 12.

(2) 7 T. R. 601. Ashurst, J. *contra*. See *Jones v. Brooke*, 4

Taunt. 464. 1 Ves. & Beam. 208.

(3) 7 T. R. 611. By this case of *Jordaine v. Lashbrooke*, the case of *Adams v. Lingard*, 1 Peake, N.P.C. 117, and some other cases of the same kind are overruled.

(4) *Bush v. Ralling*, Say.- 289,

Subscribing  
witness.

scribing witness to a deed or will, is admissible to impeach the execution of the instrument ; (1) although his evidence is to be received with all the jealousy necessarily attaching to a witness, who, upon his oath, asserts that to be false, which he has by his solemn act attested as true. (2)

## Other instances.

In an action to recover the price of goods supplied to a ship, against a party whose name appeared on the register as part owner, it was decided, that a witness, upon whose oath the register had been obtained, was competent to prove, that he had inserted the defendant's name therein without his privity or consent ; and the objection, that the witness's evidence was at variance with his oath, only would affect his credit. (3) A person, who has joined in an assignment of a ship, is a competent witness to prove that, in point of fact, he had no property in the vessel at the time of the assignment. (4) A vendor of property is competent to prove, that he had no title in the lands pretended to be sold and conveyed. (5) And, as we have already seen, a witness who admits, that upon a former proceeding he swore falsely with regard to the matters upon which he is examined, is not incompetent, however the objection may affect his credit. (6)

cited by Lord Mansfield, Cowp. 199. *Mead v. Robinson*, Willes, 423, and n. (c) *Ibid.* 425. *Heward v. Shipley*, 4 East, 180. Besides the objection arising from the witness's conduct in these cases, it was also objected, that he was incompetent from interest, as in case of a conviction he would have been indemnified under the act. As to this objection, see *post*.

(1) *Lowe v. Joliffe*, 1 Black. Rep. 365. 7 T. R. 604, 611. 6 East, 195.

(2) 1 Ves. & Beam. 208.

(3) *Rands v. Thomas*, 5 M. & S. 244.

(4) By Willes, J., 1 T. R. 301.

(5) *Tillo v. Gravet*, 2 Lord Raym. 1008. 7 T. R. 609.

(6) *R. v. Teal*, 11 East, 309, *supra*, p.

## CHAPTER V.

## OF THE INCOMPETENCY OF WITNESSES FROM INTEREST.

**T**HE fourth ground of incompetency is interest.

It is a general rule, that all persons interested in the event of a cause, are to be excluded from giving evidence in favour of that party, to which their interest inclines them. This rule is founded upon a presumed want of impartiality in an interested witness. "When a man," says C. B. Gilbert, (1) "who is interested in the matter in question, comes to prove it, it is rather a ground for distrust, than any just cause of belief; for men are generally so short-sighted as to look at their own private benefit which is near to them, rather than to the good of the world, which is more remote; therefore, from the nature of human passions and actions, there is more reason to distrust such biassed testimony, than to believe it."

General rule.

The exclusion of witnesses from interest is much more frequent than from any of the grounds of incompetency, which have been already considered, and the policy of the law on this subject is by no means free from doubt. Against the rule it may be objected, that there is no just ground for inferring, that, in the generality of instances, persons interested in the subject in controversy will be induced, from a regard to their interest, to violate the duties of morality and religion, or to incur the penalties of the law by committing perjury; nor, if they should yield to such an inducement, is it to be inferred, that they would be successful in imposing upon the judge and jury, after being subjected to the test of cross-examination, before the public, in open Court. It may be observed also, that it is not reasonable, and scarcely consistent, to exclude witnesses on account of some trifling pecuniary interest, so small perhaps as not to be supposed capable of producing a bias on their

Policy of the rule.

Objections against.

(1) Evid, (3 edit.) 122.

minds,—when yet others are freely admitted, though subject to the powerful influence of relationship, friendship, passion, or feeling: and that, at all events, the possibility of occasional hazards in the administration of justice, from the admission of the evidence of interested witnesses, is a much less evil than that of counteracting and frustrating; in many instances, the great object to which all rules of evidence ought to be directed, namely, the discovery of truth. In proportion as the means of inquiry and information are shut out, the discovery and enforcement of truth must become more difficult. The inconveniences, also, necessarily arising out of the application of such a rule, are not to be overlooked. Of this nature are the difficulties and uncertainty occasioned by frequent reference to a great variety of decisions, which require considerable research, abound with many subtle distinctions, and occasionally by their contrariety create much legal doubt. It may also be remarked, that the numerous exceptions to the general rule, which have been introduced, (which are so many arguments against the policy of such restrictions,) are scarcely reconcileable with the principle of the rule itself. For these reasons, it should seem the better course would be to admit the evidence in all cases, and to allow the objection of interest to be urged against the credit of the witness, not against his competency.

Answer to  
objections.

The reasons, in support of the principle of the existing rule, may be supposed to be to the following effect. It may be said, common experience shews, that the strict rule of law is seldom relaxed by allowing persons adversely interested, especially parties to a suit, to be examined as witnesses, without manifest danger of perjury on one side or the other:—that the inconvenience of excluding witnesses, whose interest is of a trifling nature, is a necessary consequence of allowing the objection to prevail in any case; and that there is no inconsistency in rejecting such witnesses, while others are admitted under the influence of relationship and other similar causes, the reasons for exclusion in the former case, being inapplicable to the latter; the influence of relationship is various, uncertain, and capricious, while that which arises from interest is palpable and universal; no satisfactory line, therefore, could

be drawn in the former case, (1) while the latter admits of a precise and definite rule; it may be remarked also, that the objection arising from relationship would be irremovable, while that from interest may, in ordinary cases, be removed by release or payment; and, further, that a witness biassed only by *feeling*, gives evidence *for another*, but one under the bias of *his own interest* may be considered in some degree as speaking *for himself*. With regard to the argument, that the objection should be left in every case to the consideration of the jury, who will decide upon the credibility due to a witness, it must be remembered, that a jury is frequently composed of persons unskilled in discriminating between truth and falsehood, ignorant of the real characters of the witnesses, unable therefore, to judge how far they might be influenced by interested motives, and who have only a very short space of time allowed for deciding upon the evidence. The practical inconvenience, it may be said, is by no means so extensive, as might at first be supposed; the strictness of the old law having been much relaxed in modern times: (2) and an interested witness may in general be rendered competent by means of a release. Where the interest is trifling, no great hardship can arise from requiring it to be removed, and, in proportion as it increases in amount, there is the more reason for rejecting the witness, if his interest be not removed. It will generally happen, that the direct testimony of persons excluded for interest, may be supplied by inferences from the circumstances of a case: and the practical consequence of the rule often is, that parties come to the trial prepared with unimpeachable evidence of a transaction, when otherwise they would produce witnesses, whose testimony might perplex or mislead a jury: so that, upon the whole, evidence is not lost, and it's character is improved.

(1) By the civil law relationship, in the ascending or descending line, and connection in marriage, are grounds of exclusion. By the recent code of Louisiana, the exclusion on the ground of interest is abolished; see Mr. Livingstone's

Preface, p. 255, and Bentham's *Rationale of Judicial Evidence*, vol. 1, 189, vol. 5, 34.

(2) A material improvement in this respect has been effected by a recent statute. See 3 & 4 W. 4, c. 42, s. 26, 27, *post*.

In treating of the incompetency of witnesses from interest, it is proposed to consider the subject in the following order :

1st. Of the rule of incompetency from interest considered with reference to the parties to the suit.

2dly. Of the same rule considered with reference to persons, not parties to the suit.

3dly. Of certain exceptions to the general rule of incompetency from interest,—and,

Lastly. Of the means by which the competency of an interested witness may be restored.

## CHAPTER VI.

### OF THE INCOMPETENCY OF THE PARTIES TO THE SUIT.

#### SECTION I.

#### *Of the Rule of Incompetency from Interest considered with Reference to the Parties to the Suit in Civil Proceedings.*

Principle of incompetency of parties.

**I**T has been stated to be the general rule, that all persons, interested in the event of a cause, are to be excluded from giving evidence in favour of that side, to which their interest inclines them. The persons who have the most immediate and obvious interest in the event of a cause, are the parties to that particular cause, and they are therefore in general incompetent witnesses. In considering this branch of the subject, it will be convenient to treat ; 1st, Of the incompetency of the parties in civil proceedings ; and 2ndly, In criminal prosecutions. As we shall presently see, their exclusion in both cases depends on the same general principle. In prosecutions, as well as in actions, the general rule is, that a person interested in the event is not competent. (1) In each case the competency or incompetency of the parties to give evidence depends upon the

(1) See per Cur. 9 B. & C. 560.

question, whether they are, or are not interested in the event. (1)

In general, a party to the record, in a civil suit, cannot be a witness at the trial, for himself or for a joint suiter, against the adverse party. (2)

Parties in civil suits, incompetent.

The incompetency of the parties to the record, to give evidence in their own behalf, appears to be founded upon the sole ground of their being interested in the event. In delivering the judgment of the Court of Common Pleas in a recent case, (3) Lord C. J. Tindal says, "No case has been cited, nor can any be found, in which a witness has been refused upon the objection, in the abstract, that he was a party to the suit. On the contrary, many have been brought forward, in which parties to the suit, who suffered judgment by default, have been admitted as witnesses against their own interest: and the only inquiry seems to have been in a majority of cases, whether the party called was interested in the event, or not: the admission or rejection of the witness has depended upon this inquiry." So Lord C. B. Gilbert, after stating the general rule, that no man interested in the matter in question can be a witness for himself, observes, that it is a corollary to be deduced from this rule, "that the plaintiff or defendant cannot be a witness in his own cause, for these are the persons who have a most immediate interest: and it is not to be expected that a man who complains without cause, or defends without justice, should have honesty enough to confess it." (4)

Ground of incompetency. Interest.

The parties to the record in civil suits are in general interested, both in the question at issue in the cause, and in the question of costs, which commonly depends upon the event of the cause. It is not necessary that they should be interested

Nature of the interest.

(1) The privilege of parties to a suit in not being compellable to appear as witnesses, is a subject distinct from the present inquiry, and will be considered hereafter. Much confusion has arisen from inattention to the distinction between the privilege of parties to a suit, and their incapacity in com-

mon with other interested witnesses.

(2) 1 Vernon, 230. 1 P. Wms. 596. Gilb. Evid. 116.

(3) Worrall v. Jones, 7 Bing. 398, 399.

(4) Gilb. Evid. 132, (3d edit.) See also per Lord Hardwicke, 3 Atk. 401

in both these questions: if they are interested in either point of view, they will be incompetent witnesses; it seldom, therefore, happens, that they are competent to give evidence.

**Members of corporations.**

The same principles, which render parties to the record incompetent, when suing in their individual capacities, apply to members of a corporation suing in its corporate name. Thus, in ejectment for lands of a corporation, a member of the corporation is an incompetent witness, if he be interested either in the lands sought to be recovered, or in the general funds of the corporation which are liable to the costs of the action. (1) It appears to have been at one time considered, that in cases of this nature, an individual corporator might be admitted, if the interest were of a very trifling nature: thus, in the case of the *King v. The Mayor and Commonalty of London*, (2) and in that of the City of London, concerning water bailage, (3) it was held, that in a question, concerning the right of the corporation to tolls, an individual corporator might be received as a witness for the corporation, because, it was said, the tolls would be received for the benefit of the whole corporate body, and the interest of any individual must therefore be inconsiderable. But as it has been fully settled by subsequent cases, that any interest in the event of the suit, however minute, will render a witness incompetent, the above decisions may be considered as overruled. (4)

**Costs.  
Interest in costs.**

Where the party to an action has no interest in the question in dispute, but is suing as a mere trustee for another person, he will nevertheless, in general, be incompetent, on the ground of liability to costs. (5) A *prochein ami*, or guardian, suing for an infant, is incompetent upon this ground. (6) Persons appointed governors and directors of the poor of a parish, under

(1) *Doe v. Tooth*, 3 Y. & J. 19.

(2) 2 Lev. 231.

(3) 1 Ventr. 351. And see *Corporation of Sutton Coldfield v. Wilson*, 1 Vern. 254.

(4) See *Bul. N. P.* 290. *Burton v. Hinde*, 5 T. R. 174. *Doe v. Tooth*, 3 Y. & J. 19.

(5) *Per Cur. Dowdeswell v. Nott*, 2 Vern. 317. *Davis v. Mor-*

*gan*, 1 Tyrwh. 457. 1 C. & J. 87. *Bauerman v. Radenius*, 7 T. R. 669. *Phillips v. Duke of Buckingham*, 1 Vern. 230, and see the cases cited 13 Price, 512.

(6) *Clutterbuck v. Lord Huntingtower*, 1 Stra. 505. *James v. Hatfield*, 1 Stra. 548. *Hopkins v. Neal*, 2 Stra. 1025. *Gilb. Evid.* 107.



an act of parliament, which authorizes them to assess rates on the inhabitants, but, in case of appeal, makes them liable for costs, to be indemnified out of the parochial funds, are not competent witnesses on the trial of such appeal, being individually liable to costs, in the first instance. (1) In a late case, where parochial trustees were empowered by statute to sue in the name of their treasurer, or clerk, and the act contained a provision for re-imbursing such treasurer, or clerk, his costs out of the rates, Lord Tenterden appears to have considered, that, in an action brought in the name of the treasurer, a trustee was an incompetent witness for the plaintiff, although the trustees took no benefit under the statute, and rated parishioners were thereby made competent witnesses. (2)

As the objection to the competency of a party to the suit is founded, not upon the abstract ground of being a party, but upon the ground of being interested, it follows, that if a person, tendered as a witness, has no interest whatever in the event of the suit, he will be competent, although he is a party to the record. Thus, in an action against parties in a corporate capacity, who had no individual interest in the question in dispute, and were not personally liable to costs, Lord Kenyon admitted several of the defendants, as witnesses against the claim of the plaintiff. (3) And indeed, it appears to have been always considered, that, in actions by or against corporations, individual corporators are competent, where they have no interest in the event of the suit: for in all these cases the objection to the witness has been, not that he was a member of the corporation, and consequently one of

Competent  
where free  
from interest.

Corporations.

(1) *R. v. St. Mary Magdalen, Bermondsey*, 3 East, 7.

(2) *Whitmore v. Wilks*, Mo. & Ma. N. P. C. 214. The ground of Lord Tenterden's opinion seems to have been, that the trustees were the substantial plaintiffs; but *qu.* whether they had any, and what interest in the event? The witness was admitted, leave being given to move, and a rule nisi for a new

trial appears to have been granted on this, and another point, but the final result does not appear. See *Fletcher v. Greenwell*, 5 Tyw. 316, where it was decided, that a parochial director was competent, under circumstances similar to those of the preceding case.

(3) *Weller v. Governors of Foundling Hospital*, Peake, N. P. C. 153. See 3 Atk. 401.

Inhabitants of  
parishes,  
counties, &c.

the parties to the suit, but that he had some personal interest which disqualified him from giving evidence. So in proceedings against the inhabitants of parishes and other districts, relative to settlements, repairs of highways and bridges, and other questions affecting the rates of particular districts, rated inhabitants have been always adjudged to be incompetent, (unless rendered competent by statute), by reason of their interest in the event of the suit: but inhabitants not rated had no such interest, and were always considered competent, although the particular proceedings, in the course of which their evidence was admitted, were nominally by, or against, all the inhabitants of the district. And even *rateable* inhabitants are not incompetent, if not actually rated. (1)

Co-defendant  
in case of  
judgment by  
default or  
*nolle prosequi* :

The preceding observations relate to the incompetency of parties, who retain their original situation assumed at the commencement of a suit. But questions, with regard to the competency of the parties to the record to give evidence, have most frequently arisen in actions against several defendants, one of whom has been placed in a different situation on the record, from that of his co-defendants, in consequence of a judgment by default or *nolle prosequi*. In some of these cases, the question of the witness's competency is rather complicated and difficult, and it is perhaps not easy to reconcile all the decisions on the subject; but in all of them, the inquiry has been, whether the effect of the particular proceeding, that has taken place with regard to the witness, has been to remove his interest at the trial; if such appears to be the case he will be competent: but, if he still appears to have an interest in the determination of the cause, in favour of the party on whose behalf he is tendered as a witness, he will be incompetent.

#### 1. *Effect of a judgment by default.*

Action on con-  
tract.  
Defendant in-  
competent for  
co-defendant.

In an action against two defendants on a joint contract, it was ruled by Lord Kenyon, that one of the defendants, who had suffered judgment by default, was incompetent as a witness, in behalf of the other defendant, to negative the contract; for if

(1) See *Marsden v. Stanfield*, 7 B. & C. 818.

negated as to one, the contract failed as to the other, and the plaintiff could make no use of his judgment by default against the witness, who was consequently interested in obtaining a verdict for the defendant. (1)

It has also been decided, that a defendant so situated is not competent for the plaintiff; upon the ground, that, if the plaintiff succeed in the action, the witness will be entitled to contribution from his co-defendant, but that if the plaintiff fail, the witness will himself be liable for the whole demand; for although, as stated in the previous case, the judgment by default in that particular action would become inoperative, by the failure of the plaintiff on the trial; yet it was said by the Court, the plaintiff might proceed against the witness for the recovery of the whole demand in another action, and the witness would relieve himself from this liability to a new action, by establishing the joint liability of his co-defendant. (2) In a subsequent case, a witness, similarly situated with the witnesses in the two preceding cases, was considered incompetent for the plaintiff, although he had been released by the plaintiff as to all actions except the action on trial. It was argued in this case, that the witness was, at all events, rendered competent by the release, for if the plaintiff failed, the witness would be freed from all liability whatsoever; but if the plaintiff succeeded, the judgment by default would become available against the witness, and he would be liable jointly with the other defendant, and that consequently his giving evidence for the plaintiff must be against his own interest; but the Court of Common Pleas decided, that he was incompetent. (3)

(1) *Brown v. Fox*, Ex. Sum. Ass. 1789. 8 Taunt. 141.

(2) *Brown v. Brown*, 4 Taunt. 752. The distinction between this and the preceding case is very refined; for, in the preceding case, the witness was rejected, because he was interested in procuring the failure of the plaintiff, and here he was also rejected, because he was interested in procuring his success.

(3) *Mant v. Manwaring*, 8 Taunt. 139. 2 Moore, 9, S. C. The Court

appear to have considered in this case that a party to the record was incompetent without reference to the question of interest; and from the judgment of Dallas, J. and Burrough, J., it also appears to have been considered, that one of several defendants could in no case, even against his own interest, give evidence against his co-defendants without their consent. But see *Norden v. Williamson*, 1 Taunt. 378. *Worrall v. Jones*, 7 Bing. 395, *infra* 52.

Sometimes  
competent for  
plaintiff.

If, however, a defendant, who has suffered judgment by default be so situated, that he cannot claim contribution from his co-defendants, he will be a competent witness against them. Thus in an action on a bond against a principal and two sureties, where the principal had suffered judgment by default, and was tendered at the trial as a witness on behalf of the plaintiff, the Court of Common Pleas, after a review of all the authorities, and time taken to consider, held, that he was competent. (1) In giving judgment in this case the court said, that no objection could arise on the ground that the witness was interested to procure a verdict for the plaintiff, inasmuch as, being the principal debtor, he could not call for contribution from the other defendants, but was himself ultimately liable to all the damages and costs recovered in the action; and that there was no case to shew that a witness was disqualified, merely because he was a party to the suit, where he was not interested in giving his testimony.

Action on tort.  
Co-defendant  
suffering judgment by  
default.

In actions upon torts against several defendants, the situation of a defendant, who has suffered judgment by default, varies from that of a defendant who has suffered judgment by default in an action against several parties upon a joint contract. In the latter case, as we have already observed, if the plaintiff fails upon the trial against the other defendant, his judgment will, in general, be rendered wholly unavailing; but in the former case, he will, in general, be entitled to enforce his judgment against the party who has suffered it to pass against him, although the other defendants who have pleaded may obtain a verdict. In the case of *Ward v. Haydon*, (2) it was ruled by Lord Kenyon at *nisi prius*, that the defendant in an action of trover, who had suffered judgment by default, was a competent witness for his co-defendant, who had pleaded not guilty. His Lordship observed, that by reason of the judgment by default, the cause was at an end, with regard to the witness; that he was not liable to the costs of the issue tried against the

Held competent for co-defendant.

(1) *Worrall v. Jones*, 7 Bing. 395. See the judgment of Tindal, C. J., in this case, quoted *ante*. And see *post*, as to a party to a cause not being *compellable* to

give evidence against his own interest.

(2) 2 Esp. N. P. C. 553. Peake's Add. Ca. 126, S. C.

other defendant, and was not himself released, whatever might be the event of that issue. The same point appears to have been also ruled at *nisi prius* by another learned judge, in an action of trespass. (1)

But there may, perhaps, be some doubt, whether the decisions, just adverted to, are to be considered as furnishing a general rule, applicable to all cases, in which one of several defendants in an action of tort, has suffered judgment by default. According to the ordinary practice, there is but one assessment of damages in cases of this nature, and the same jury, that try the issue between the plaintiff and the defendants who have pleaded, also assess the damages against the defendant, who has suffered judgment by default, and the other defendants, if they are found guilty. It is obvious, that a defendant, who has suffered judgment by default, has an immediate interest in reducing the amount of damages, and therefore, as it should seem, could not be called for this purpose. And in a late case, (2) in which a defendant, who had suffered judgment by default in an action of trespass, was called as a witness for two co-defendants, who had pleaded, Best, C. J., was of opinion, that the witness was incompetent; for if his evidence were admitted on behalf of the other defendants, it might give such a complexion to the case as to operate in reduction of the damages against himself. (3)

Damages  
assessed.

(1) *Aron*. 2 Campb. 334, n. Wood, B. See also by Le Blanc, J., 2 Campb. 333, n.

(2) *Mash v. Smith*, 1 Car. & P. 577.

(3) The Lord Chief Justice however, admitted the witness, with leave to move if the result of the cause should render it material. The result does not appear from the report, nor does it appear whether the nature of the testimony of the witness was such as might tend to reduce the damages. In *Ward v. Haydon*, the action was trover for a carriage, and the witness was called, not upon any point connected with the value of the carriage, but only to shew that the conduct of the other defendant was

not such as amounted to a conversion by him. See the note in the report of this case in Peake's Add. Ca. 126, with reference to the question whether, according to the practice of the Court, the witness was not in fact interested in regard to the costs. In addition to the difficulty adverted to in *Mash v. Smith*, there appears to be another, which may perhaps, in some cases, prevent a defendant, who has suffered judgment by default, from giving evidence in behalf of a co-defendant who has pleaded; for it should seem, that where the plea set up by the latter is of such a nature as to shew that the plaintiff could have no real cause of action against any of

Incompetent  
against co-de-  
fendant.

Whatever may be the true rule with regard to the competency of one of several defendants, who has suffered judgment by default, as a witness for his co-defendants, it has been ruled at *nisi prius*, that he will not be an admissible witness for the plaintiff against them. In the case of *Chapman v. Graves*, (1) which was an action of trespass against three, Mr. Justice Le Blanc rejected one of the defendants, who had suffered judgment by default, and was tendered as a witness against the others who had pleaded, and he distinguished the case from *Ward v. Haydon*, by observing, that there the witness was called to *exculpate* his co-defendant, but that here he was called to *inculpate* the others. He also observed, that the general rule was, that a party to the record was not an admissible witness, and that where there had been an innovation of the rule he was not disposed to extend it. (2)

Ejectment.  
Co-defendant  
suffering judgment by default.  
Competent for plaintiff.

In a joint action of ejectment against two defendants, a defendant, who suffers judgment by default, has been considered a competent witness for the plaintiff, to prove the other defendant in possession. (3) Lord Ellenborough in this case said, that a verdict for the plaintiff would not prevent him from

the defendants, the defendant, who has suffered judgment by default, will be entitled to the benefit of the defence if established. See *Tidd's Prac.* 9 edit. 894, 895. 2 *Stra.* 1108, 1222. Where the defence of the party, who has pleaded, goes merely to his own personal discharge, without affecting the plaintiff's right of action against his co-defendant, of course this difficulty would not arise.

(1) *Campb.* 333, n.

(2) These expressions would appear to countenance the notion of a technical rule disqualifying parties to the record as parties, without reference to the question of interest. See also 8 *Taunt.* 139. But vide *supra*, and 7 *Bing.* 398. With reference to the distinction between exculpating and inculpating the other defendants, it is observable, that by exculpating them, a defendant who has suffered judgment

by default, subjects himself to the sole liability of all the damages the jury may assess against him; while, by inculpating them, he makes them jointly liable with him. And if the plaintiff should levy the whole amount of damages against them, as there is no contribution between wrong doers, the witness might, by means of his evidence, escape the payment of any part; but as the plaintiff might, if he thought proper, levy the whole amount against the witness, who in such case would have no remedy for contribution against the others, the witness would appear to have no certain interest in fixing them, but only the prospect of a contingent advantage, and *qu.* if this could be a good ground of disqualification? See per Lord Ellenborough. *Doe v. Green*, 4 *Esp.* 198, *infra*.

(3) *Doe v. Green*, 4 *Esp.* 198.

suing the witness for mesne profits ; and that the only supposed interest imputable to the witness was the possibility, that the plaintiff would sue the other defendant alone, but that this remote and possible interest would not render the witness incompetent.

It appears also that one of several defendants in ejectment, in possession of part of the premises, and who suffers judgment by default as to such part, will be competent to give evidence for a co-defendant who pleads. In Buller's *Nisi Prius*, (1) it is said that if a material witness for the defendant in ejectment be also made a defendant, the right way is for him to let judgment go by default ; but if he plead, and by that means admit himself to be tenant in possession, the Court will not afterwards upon motion strike out his name. In such a case, adds Mr. J. Buller, if he consent to let a verdict be given against him for so much as he is proved to be in possession of, I see no reason, why he should not be a witness for another defendant. (2)

Competent for defendant.

## 2. *Effect of a nolle prosequi.*

It has been decided, in several cases, that if one of several defendants, in an action on a joint contract, pleads bankruptcy and certificate, and the plaintiff, instead of denying the plea, admits it, and enters a *nolle prosequi*, as to the defendant pleading it, such defendant will be a competent witness for a co-defendant who has pleaded to the merits. (3) In a late case, this point arose in an action against two persons, who had been partners upon a bill of exchange accepted during the partnership, and Lord C. J. Tindal, in delivering the judgment of the Court of Common Pleas, said, that the only question in the case was, whether the defendant, who had pleaded, would be entitled to sue the witness either at law or equity for contribution ; that it was clear, he might have done so before the

Defendant pleading bankruptcy—competent for co-defendant after *nolle prosequi*.

(1) P. 285.

(2) B. N. P. 286, citing *Dormer v. Fortescue*, 9 Geo. 2. Willes, 343, (n).

(3) Said by Park, J. (7 Taunt.

607) to have been so ruled by Le Blanc, J. See also *Moody v. King*, 2 B. & C. 558. *McIver v. Humble*, 16 East, 171.

stat. 49 Geo. III. c. 121, s. 8, but that since that statute the solvent partner was entitled, and consequently obliged, to prove under the commission, and that the certificate would be a bar to any action for contribution: the bankrupt, therefore, being discharged from all liability, was a competent witness for the defendant. (1)

Effect of *nolle  
prosequi*.

It may probably be considered, that in these cases, the effect of the *nolle prosequi* is entirely to put an end to the proceedings in the action, as far as the particular defendant is concerned, and that consequently, although he was originally one of the parties to the suit, he cannot be considered as a party at the time of the trial. At all events, upon the *nolle prosequi* being entered as to him, he ceases to have any immediate interest in the action, and the question of interest in the event could only arise in respect of a liability over to the other defendant, for whom he is called as a witness. Where no *nolle prosequi* is entered as to the witness, his situation is obviously different. In an action of assumpsit on a joint contract against two defendants, one of whom had pleaded bankruptcy, and the other had pleaded non-assumpsit, and issue had been joined on both pleas, Lord Kenyon refused to admit the former as a witness for the latter, although it was proposed to give releases from the defendant, who had pleaded to the bankrupt, and from the bankrupt to his assignees. (2) His Lordship said, that the witness was liable to the costs of the action, and that this was an interest which could not be released. In a subsequent case of the same description, before Lord Ellenborough, the certificate of the bankrupt was put in, and it was proposed that a verdict should be taken in his favour, and that he should then be called as a witness for the other defendant, but Lord Ellenborough refused to permit this course to be taken, and the wit-

Not competent where no  
*nolle prosequi*.

Separate verdict not allowed.

(1) *Affalo v. Fourdrinier*, 6 Bing. 306. The bankrupt had released his surplus, and thereby removed any interest he might have had in increasing the fund of his estate by defeating a demand in respect of which the solvent partner might have proved for contribution. See as to the effect of

the 49 Geo. 3, c. 121, s. 8, in restoring competency. *Moody v. King*, 2 B. & C. 558. *Ex parte Young*, 2 Rose, B. C. 40. *Wood v. Dodson*, 2 M. & S. 195. The provisions of this statute are contained in sect. 52 of 6 G. 4, c. 16.

(2) *Raven v. Dunning*, 3 Esp. 25.



ness was rejected. (1) So in a later case, (2) in which two out of five defendants in an action of assumpsit pleaded bankruptcy, and the plaintiff had proved under their commission, thereby electing to take the benefit thereof, it was held, by the Court of Common Pleas, that these defendants, having substantiated the plea, were not entitled to a separate verdict in their favour, in order that they might be called as witnesses, on behalf of the other defendants who had pleaded the general issue. It was contended in this case, that the proposed witnesses were disinterested, inasmuch as they were entirely discharged from either contribution or costs by the stat. 49 Geo. III. c. 121, and that, having proved their plea, they were entitled to a verdict; but the Court held otherwise: Gibbs, C. J. said he knew no law which required a judge to stop in the middle of a cause, to consider separately the case of certain of the defendants, in order that they might be made witnesses for the other defendants. (3)

*Emmett v. Butler*, separate verdict not allowed.

But in a more recent case, at *nisi prius*, where one defendant had pleaded bankruptcy, and the other to the merits of the action, and it was proposed, that, on proof of the bankrupt's certificate, a verdict should be taken for him, in order that he might appear as a witness for his co-defendants, Parke, J. permitted this course to be adopted, and the witness was admitted. (4)

Separate verdict allowed.

The effect of the separate verdict appears to be the same as

(1) *Currie v. Child*, 3 Campb. 283.

(2) *Emmett v. Butler*, 7 Taunt. 599. 1 Moore, 332, S. C.

(3) 7 Taunt. 606.

(4) *Bate v. Russell*, Mo. & Ma. N. P. C. 332. In this case upon the preceding cases of *Raven v. Dunning*, *Currie v. Child*, and *Emmett v. Butler*, being cited as authorities against the admissibility of the witness, Parke, J. observed, that they were no longer in point, in consequence of the altered state of the bankrupt laws, but that he would give no opinion on the competency of the witness, but would admit him, giving leave to

move. No motion was made on the question of competency, and the point appears the same as in *Affalo v. Fourdrinier*, 6 Bing. 306, *supra* 56. It is observable, however, that the cases of *Currie v. Child* and *Emmett v. Butler*, both occurred after the 49 Geo. 3, c. 121, (by the operation of which statute it was decided, that the bankrupt became competent in *Affalo v. Fourdrinier*), but these cases seem to have proceeded less upon the ground of incompetency in the witness, than upon the propriety of allowing a separate verdict to be taken in his favour at the trial.

Effect of separate verdict, in restoring competency. See *infra*.

that of a *nolle prosequi*, in putting an end to the proceedings, as far as the bankrupt is concerned, and in depriving him of all immediate interest in the result with regard to the other defendants. It will be seen, presently, that one of several defendants has been frequently made a competent witness for his co-defendant, by the effect of a separate verdict in an action of tort, but the case just cited appears to be the first, in which this course has been allowed to be taken in an action on a contract. It would however appear to be difficult to assign any good reason for not permitting the practice to be adopted in actions of contract, and it is obvious, that if it were not allowed, it would be in the plaintiff's power to deprive the defendant, who had pleaded to the action, of the benefit of the evidence of the bankrupt, by joining issue on the plea of bankruptcy, instead of entering a *nolle prosequi*, although there might be no pretence for questioning the truth of the plea.

§

We shall now proceed to notice the cases, in which a defendant in an action of tort may be rendered a competent witness for his co-defendants, by the effect of a separate verdict at the trial.

### 3. *As to a Separate Verdict at the Trial.*

Co-defendant in tort unnecessarily sued. General principle.

The general principle, which governs the decisions on this subject, is laid down by C. B. Gilbert, as follows: If any person, be arbitrarily made a defendant, to prevent his testimony in the cause, the plaintiff shall not prevail by that artifice, but the defendant, against whom nothing is proved, shall notwithstanding be sworn; for here the defendant does not swear in his own justification, but in justification of another with whom he was unnecessarily joined; and if this were not allowed, the plaintiff might turn all the several witnesses into defendants, and thus might be able to prove what he pleased, without contest. (1) But this rule must be understood to apply to those cases only, where there is no kind of evidence against such defendant; for it is laid down, that if there be any evidence against him, though not enough to convict him, in the

(1) Gilb. Evid. 117. Bul. N. P. 285.

judge's opinion, he cannot be called as a witness, but his guilt or innocence must await the event of the verdict, the jury being judges of the fact. (1)

In order to render a party, so unnecessarily sued, competent to give evidence, the jury are directed to find a separate verdict in his favour, and, the cause being then at an end with respect to him, he may be called as a witness on behalf of a co-defendant. Some contrariety of practice has prevailed with respect to the particular stage of the cause, at which the separate verdict may be taken in favour of the party or parties unnecessarily sued. In some cases, the rule laid down has been, that one of several defendants is not entitled to a verdict separately from the rest, immediately at the close of the plaintiff's case, but must wait until the whole of the case of the other defendants, exclusive of the evidence which he may have to give, is entirely finished. (2) But it is now settled, by the unanimous opinion of all the judges, that a defendant against whom the plaintiff has adduced no evidence, is entitled to a separate verdict immediately upon the close of the plaintiff's case. (3)

Separate verdict taken.

Practice—time of taking verdict.

(1) *Ibid.*

(2) *Wright v. Paulin*, Ry. & Mo. N. P. C. 128. *Ward v. Bourne*, Trin. T. 1821, MS. *Huxley v. Berg*, 1 Stark. N. P. C. 98. *Wynne v. Anderson*, 3 Car. & P. 596.

(3) Per Parke, J., 6 Car. & P. 215. *Child v. Chamberlain*, and see *Russell v. Rider*, 6 Car. & P. 416. It has already been observed, that the cases, in which a separate verdict has been allowed to be given for one of several defendants, in order to enable him to appear as a witness for the rest have been for the most part cases of actions of tort. It is obvious, that the question can rarely arise in actions of contract, except in cases where one of several defendants pleads a plea of personal discharge, such as bankruptcy and certificate. See *ante*, 57. *Bate v. Russell*, Mo. & Ma. 332, where a separate verdict was allowed to be taken. And *Currie v. Child*, 3 Campb. 283, and *Em-*

*mett v. Butler*, 7 Taunt. 599, where it was not allowed. In the latter case, *Dallas, J.*, and *Burrough, J.*, distinguished the case before the Court from the cases in actions of tort, on the ground, that in those actions a defendant was allowed to have a separate verdict only where he could ask for it at the close of the plaintiff's case, in consequence of the absence of any evidence to fix him: but, in the former case, the plea of the defendants could only be established by affirmative evidence offered by themselves. It is observable, that in *Emmett v. Butler*, the plea was not the common one of bankruptcy and certificate, but that the plaintiffs had proved, and thereby made their election. Where a plea is special, and involves the consideration of many facts, it is obvious, that there would be much inconvenience in splitting the case, and taking separate verdicts; but there seems to be no such inconvenience, where

Party named in the declaration as a trespasser, but not made a defendant.

In an action of tort, where a particular person is named in the declaration, as having been engaged in committing the alleged injury, but has not been made a defendant in the suit, he will be a competent witness. Thus in trespass, where the declaration alleged, that the defendant, together with A. B., committed the alleged wrong, and the defendants pleaded, that A. B. paid the plaintiff a guinea in satisfaction, and issue was joined thereon, the defendant called A. B. as a witness, and Eyre, C. J., permitted him to be examined. (1) It is obvious, that in this case, although the party is named in the record, he is not a party to the suit, and the grounds that would disqualify a co-defendant in trespass from giving evidence, would not apply to the witness in the preceding case, for not being a party, he could not be immediately affected by the event of the suit, either in regard to the damages sought to be recovered, or the costs; if the plaintiff succeeded, the witness would not be liable to an action for contribution, for there is no contribution between wrongdoers; and if the plaintiff failed, and afterwards sued the witness, the verdict in the former action would not be evidence in the witness's favour. It appears, however, to have been considered that if the plaintiff could prove a party named in the *simul cum*. guilty, and shew that he was made a party, by producing the original or process against him, and proving an ineffectual endeavour to arrest or serve him, the defendant would not be allowed to have the benefit of his testimony. (2) But if nothing can be proved against the witness, he is clearly competent. (3)

Party witness for plaintiff, made defendant by mistake.

Where a material witness for the plaintiff is by mistake made a defendant, the Court will on motion suffer his name to be

the whole proof consists of the bankrupt's certificate.

(1) *Poplett v. James*, B. N. P. 286.

(2) *Reason v. Ewbank*, B. N. P. 286. See also per Lord Hardwicke, *Lloyd v. Williams*, R. T. H. 123. In the latter case, the plaintiff had proceeded to outlawry against the proposed witness, and he was rejected. See also *Hill v. Fleming*, R. T. H. 264. These cases appear to have proceeded on

the ground, that a co-trespasser, who had been originally made a party to the suit upon sufficient grounds, ought not to be allowed to come forward as a witness to defeat the plaintiff, after he had prevented the plaintiff from proceeding effectually against him, by his own wrongful act in eluding the process. See 1 Atk. 452.

(3) *Page v. Crook*, Sty. 401, and see 1 Atk. 452.

struck out of the record, even after issue joined, and then he may be examined; (1) or in the case of an information, the Attorney General may enter a *nolle prosequi*, as to one of the defendants, and so make him a witness. (2)

If a material witness for a defendant in ejectment has been made a co-defendant through mistake, it is said that, after plea, the Court will not, upon motion, strike out his name. (3) We have seen, that he will be a competent witness, if he suffer judgment by default. (4) And Mr. Justice Buller observes, (5) with reference to the case of a tenant in possession of part of the premises, "if he consent to let a verdict be given against him for so much as he is proved to be in possession of, I see no reason why he should not be a witness for another defendant."

## SECTION II.

### *Of the Competency of Parties to Criminal Prosecutions, and of the Party injured by the Offence.*

In treating of the subject of the present section we shall, in the first place, consider the competency of the prosecutor or party injured by the offence, who is generally, though not necessarily nor always, the prosecutor.

The general rule is that the prosecutor, or party injured by an offence, is a competent witness on the part of the prosecution. An indictment, though commonly set in motion, and carried on at the instance of the party injured, is in fact a proceeding instituted in the name and on the behalf of the crown; and its object is not the reparation of individual injury, but the satisfaction of public justice. The single question, upon which the jury pronounce their verdict, is the innocence or guilt of the prisoner. And the prosecutor or party injured has, in general, no direct interest in the determination of the question,

(1) 1 Sid. 441, Bul. N. P. 285.

(2) Rep. temp. Hardw. 163, B. N. P. 285.

(3) B. N. P. 285, citing Dormer

v. Fortescue, Willes, 343, n.

(4) *Ante*, 55, and Doe v. Green, 4 Esp. 198

(5) B. N. P. 285.

or in the sentence which follows a conviction. In civil suits, a party to the proceeding, who has no beneficial interest in the question in controversy upon the record, is commonly incompetent to give evidence, upon the ground of an interest in the question of costs; but in criminal proceedings, it is well known that the costs are in general not dependent upon the event of the prosecution. (1) Except therefore, in particular cases, which will be presently noticed, a prosecutor or party injured has no direct interest in the event of the prosecution.

No indirect  
interest.

But although the prosecutor or party aggrieved is in general free from direct interest, it was formerly supposed that he was incompetent, by reason of an indirect interest arising from the use of the record of conviction, as evidence in his favour in a subsequent civil suit.

In treating upon documentary evidence in a subsequent part of the work, it will be seen that the record of a judgment obtained in one proceeding, may often be used as evidence of the facts appearing to have been decided by such record, in some subsequent proceeding: and, in considering the application of the rule of incompetency from interest with regard to persons not parties to the suit, it will appear, that such persons, though free from all direct interest in the event of the particular suit, were often disqualified by reason of an indirect interest, arising from the circumstance of their being so situated with regard to the question in controversy in that suit, that the record of the verdict or judgment therein might be used as evidence for or against their own claims, in some subsequent suit by or against themselves. Upon the same principle it was formerly supposed, that a prosecutor or party injured in a criminal prosecution, who had no direct interest in the event, might nevertheless avail himself of the record of a conviction as evidence in his own favour in a subsequent civil suit, and that this power of availing himself of the record in support of

(1) The general power of awarding costs in criminal trials, depends upon the stat. 7 Geo. 4, c. 64, s. 22, 23, which gives a discretionary

power to the Court, without any reference to the result of the proceedings.

his own interest on a subsequent occasion, was an indirect interest, which rendered him incompetent to give evidence in support of the indictment.

But it has now become an established rule in all the courts, that a verdict in a criminal prosecution can, in no case, be used as evidence in a subsequent civil suit, either at law or in equity, on behalf of a party who has himself been called as a witness on behalf of the prosecution. (1) From hence it appears to follow, that no objection on the ground of an indirect interest in the record for the purposes of evidence can be made to the prosecutor or party aggrieved, who has appeared as a witness in support of the indictment, because, by the very act of appearing in the character of a witness, such party gives up all power of using the verdict as evidence, in his own favour, on any subsequent occasion.

General rule.  
Record not admissible, where prosecutor a witness.

One of the earlier cases in which the prosecutor appears to have been rejected on the ground of an indirect interest, was the case of *The King v. Whiting*, where, upon an indictment for a fraud, in obtaining a promissory note from the prosecutor, against whom an action had been brought upon the note, it was held, that the prosecutor was an incompetent witness for the prosecution, on the ground that the conviction of the defendant would influence the jury on the trial of an action on the note. So in indictments for perjury alleged to have been committed by the defendant, on the trial of an action of ejectment, (2) or in a suit in equity (3) to which the prosecutor was a party, it was considered that the prosecutor was an incompetent witness in support of the indictment, on the supposition that he might derive some benefit in the civil proceedings, by convicting the defendant of perjury. And where the indictment was for perjury in a civil action, in which judgment had been obtained

Earlier cases—  
prosecutor rejected.

(1) *Bartlett v. Pickersgill*, 4 East, 577, n. (c) 4 Bur. 2255. 1 Eden, 515. 1 Cox, 15. *R. v. Boston*, 4 East, 572, 581. *Smith v. Rummers*, 1 Campb. 9. *Hathaway v. Barrow*, 1 Campb. 151. *Burdon v. Browning*, 1 Taunt. 520. In treating of records in criminal pro-

ceedings *infra*, it will be seen that their inadmissibility in civil suits has sometimes been rested on broader principles than that which is stated in the text.

(2) *R. v. Ellis*, 2 Stra. 1104.

(3) *R. v. Nunez*, 2 Stra. 1043.

against the prosecutor on the testimony of the party indicted, it was thought an indispensable requisite to show, that the judgment had been satisfied, on the supposition that the prosecutor, in the case of his procuring a conviction, might use it for the purpose of obtaining relief in equity against the judgment. (1) And even where the prosecutor, had actually paid the money to which he had become liable through the testimony of the party indicted, he was still considered incompetent, if he had filed a bill in equity for relief. (2)

Cases—prosecutor received.

On the other hand, the principle of the decision in *R. v. Whiting*, after having been questioned by Lord Hardwicke, (3) was overruled in a later case, in which it was held that the objection that the witness was interested in a civil action, involving a similar question, went only to the credit of the witness, and not to his competency, unless the conviction in the prosecution could be given in evidence in the civil action. (4) And on the trial of an indictment for perjury, where a civil action and a suit in equity were pending at the same time between the prosecutor and the defendant, and the perjury was alleged to have been committed in an answer put in by the defendant in the suit in equity, it was decided that the prosecutor was a competent witness in support of the indictment, as he could not avail himself of the conviction as evidence in his favour, in any civil proceeding between them at law or in equity. (5)

(1) *R. v. Eden*, 1 Esp. N. P. C. 97.

(2) *R. v. Dalby*, 1 Peake, N. P. C. 12. See also *R. v. Menetone*, cited in *R. v. Dalby*, and 4 East, 576.

(3) *R. v. Bray*, Rep. temp. Hardw. 358.

(4) *R. v. Broughton*, 2 Str. 1229, and see per Lord Mansfield, 4 Burr. 2255.

(5) *R. v. Boston*, 4 East, 472. In a very recent case, *R. v. Hulme*, 7 Car. & P. 8, an opinion is expressed by Lord Denman, that the prosecutor of an indictment for perjury, who stated that he expected the defendant would be a witness against him in an action that would shortly come on to be tried, was incompetent, by reason of the interest he had in

getting rid of the defendant as a witness, by convicting him of perjury. His Lordship received the witness, in order to allow an opportunity for reviewing his decision. It may be observed, however, that in order to disqualify the witness, the conviction and judgment must be produced and proved, and the authorities above cited appear to shew, that the record would not be admissible evidence for the prosecutor, if he had appeared as a witness in support of the indictment, for it would be allowing him indirectly to give evidence in his own cause. See per Lord Ellenborough, 1 Campb. 11. Per Mansfield, C. J., 1 Campb. 151. It is clear that the record would not be evidence on



To the general rule, by which the prosecutor or party injured is a competent witness in criminal prosecutions, on the ground of absence of interest, an exception formerly prevailed in the case of an indictment for forgery, in which case it was the settled doctrine, that the party, upon whom the alleged forgery had been committed, was incompetent to prove the instrument not genuine, although it was clear, that he could not use the conviction as evidence in his own favour in a civil suit upon the forged instrument. This doctrine, (which appears to have originally proceeded, in part, upon the notion that a prosecution for forgery was a species of proceeding *in rem*, and that a conviction warranted a judicial cancellation of instrument), was long considered as an anomaly in the law of evidence, (1) and was often productive of great inconvenience in excluding the most satisfactory testimony that could be given in trials for this offence. This inconvenience has been removed by the late statute of the 9 Geo. 4, c. 32, s. 2, whereby it is enacted, "that on any prosecution by indictment or information, either at common law or by virtue of any statute, against any person for forging any deed, writing, instrument, or other matter whatsoever; or for uttering or disposing of any deed, writing, instrument, or other matter whatsoever, knowing the same to be forged; or for being accessary before or after the fact to any such offence, if the same be a felony, or for aiding abetting or counselling the commission of any such offence, if the same be a misdemeanor; no person shall be deemed to be an incompetent witness in support of any such prosecution, by reason of any interest which such person may have, or be supposed to have, in respect of such deed, writing, instrument, or

Exception formerly existing with regard to forgery.

Stat. 9 G. 4, c. 32.

Party aggrieved in forgery, competent.

the merits, and using it for the purpose of shutting out evidence on the merits, by disqualifying an adverse witness. In both cases the party would be indirectly giving evidence in his own favour, and the substantial result would be the same. Independently of this objection, the interest is of an uncertain description, consisting in the expectation that the defendant would be a witness against him; and the effect of disqualifying a witness on this ground would not be confined to perjury alone, but

would equally apply to all trials for felony and misdemeanors producing legal infamy, where the witness expected the defendant would give evidence against him on a subsequent occasion.

(1) See per Lord Ellenborough, 4 East, 582. Per Abbott, C. J., 4 B. & Ald. 210. The doctrine was confined to criminal prosecutions, and did not apply where the question of forgery arose in a civil suit. Hunter v. King, 4 B. & Ald. 209.

Forgery now  
on same footing  
as other  
cases.

other matter." The effect of this enactment is, to place the law of evidence in cases of forgery upon the same footing as in other criminal prosecutions: and therefore, the party aggrieved by an alleged forgery, whether he be the prosecutor or not, is now in all cases a competent witness in support of the indictment.

Prosecutor, or  
party injured,  
sometimes in-  
competent  
from interest.

But, although, in general, a prosecutor or party aggrieved has no interest in the event of a prosecution, and is therefore a competent witness, there are several classes of cases, in which, by virtue of some legislative enactment, he is entitled to a particular benefit or advantage upon obtaining a conviction of the party accused. In these cases, where the benefit or advantage will immediately result to the witness, on a conviction being obtained, the witness will be interested, and he will be incompetent, unless the general rule of law be dispensed with in the particular case, either by some legislative enactment, or some principle of public policy, requiring that his evidence shall be received. (1)

Summary con-  
victions.

Thus, in cases of summary convictions, where a penalty is imposed by statute, and the whole or part is given to the informer, who becomes entitled to receive it immediately upon the conviction, the informer is an incompetent witness, unless he is made competent by statute. (2)

Forcible entry.

And upon an indictment for a forcible entry upon the 21 Jac. 1, c. 25, or the 8 H. 6, c. 9, where the effect of a conviction is to entitle the tenant to an immediate award of restitution of the lands, such tenant is incompetent by reason of his interest in the event of the indictment. (3)

Exceptions.—  
Prosecutor, or  
party grieved,  
sometimes com-  
petent, though  
interested.  
See post, Ex-  
ceptions.

There are, however, many cases, in which a prosecutor or party grieved is entitled, by virtue of some statute or otherwise, to some immediate benefit, upon obtaining the conviction of the

(1) See the judgment of the Court of K. B. in *R. v. Williams*, 9 B. & C. 545, 560.

(2) *R. v. Tilley*, 1 Stra. 315. *R. v. Stone*, 2 Lord Raym. 1545. *R.*

*v. Piercy*, Andr. 18. *R. v. Blaney*, Andr. 240.

(3) *R. v. Williams*, 9 B. & C. 549. *R. v. Beavan*, Ry. & Mo. N. P. C. 242.

party indicted, but is nevertheless competent to give evidence in support of the prosecution, either by the express provisions, or necessary implication of the statute conferring the interest, or on some strong ground of public policy. Such cases are to be viewed as exceptions to the general principle, relative to the incompetency of interested witnesses, and they will be particularly examined hereafter in treating on this branch of the subject under consideration. One exception of this nature occurs in the cases of prosecutions for robbery or theft, where the party injured is competent, notwithstanding he becomes entitled to restitution of his property, immediately upon obtaining a conviction of the offender. (1)

Stolen goods—  
restitution.

There are other cases, in which a prosecutor or party injured by an offence is entitled to a pecuniary penalty from the person who has committed the offence, but such penalty is not recoverable by means of a criminal prosecution, and upon the event of such prosecution, but only by a separate civil action. In these cases no objection arises to the competency of the party as a witness in a criminal prosecution, because, as we have already seen, if he appear as a witness in support of the indictment, the conviction could not be used as evidence for him in a subsequent civil action for the recovery of the penalty. Thus, on an indictment on the statute 9 Ann. c. 14, s. 5, for fraudulent gaming, the loser of the money is competent to prove the loss; (2) for the pecuniary penalty imposed by the statute is not immediately recoverable upon a conviction being obtained on the indictment; but is given by the express words of the statute to such parties as shall sue for the same by a separate action, and the conviction would not be admissible evidence in an action by the party, to recover the penalty. (3) So in a prosecution for seducing artificers, under the statute 23 Geo. 2, c. 13, s. 1, which subjects offenders to a penalty of 500*l.*, the prosecutor is a competent witness; for the statute impliedly renders a separate action necessary, for the purpose

Penalty recoverable by separate action.

(1) See 3 Bing. 300, 301. Per Parke, J., 9 B. & C. 550, and per Bayly, J., *ib.* 557, and *infra*.

(2) R. v. Luckup, Willes, 425, (n.)

(3) See *per* Cur. 9 B. & C. 557, 558.

Perjury on  
stat. 5 Eliz.  
c. 9.

of obtaining the penalty. (1) Upon the same principle, it should seem, on an indictment for perjury founded on the statute 5 Eliz. c. 9, which imposes a pecuniary penalty, and gives half to the party grieved, such party would be a competent witness; for the penalty appears to be recoverable not by means of an indictment, but by a separate action, and the party grieved could not use the conviction as evidence in such action. (2) Cases of this nature are not, therefore, to be viewed as exceptions to the rule respecting interested witnesses; for in none of them has the witness any real interest in the event of the prosecution.

Fine or imprisonment/

Even in cases, where by statute a pecuniary penalty may be immediately recoverable upon the event of a criminal prosecution, and where the prosecutor, or informer, is entitled to part of the amount, it has been held, that he will not be an incompetent witness, if it be in the discretion of the Court to punish the offender either by fine or imprisonment. (3) This is on the ground that a witness will not be incompetent from interest, unless the interest be *certain*: and in cases where a fine is made to depend upon the discretion of the Court, it is quite uncertain, until the judge pronounces his sentence, whether the informer will derive any benefit from the event of the prosecution. It may be observed, however, that the witness is at least interested to the extent of securing the chance of a pecuniary benefit, which in many cases may approximate nearly to a certainty.

Defendant in  
criminal prosecutions.  
Interested and  
incompetent.

With regard to the competency of defendants in criminal prosecutions, it is scarcely necessary to observe, that as they are in general immediately interested in the event, it does not often happen that they can be called as witnesses.

But as we have seen, that in civil actions against several de-

(1) *R. v. Johnson*, Willes, 425, and 9 B. & C. 557, 558.

(2) *Sed qu.* The point appears to have been ruled otherwise in an old case, *Bacon's case*, 2d vol. Ab. 687, and see *Bul. N. P.* 289. *Gilb. Evid.* 111. The question, of course, depends upon the point, whether

a separate action is, or is not necessary for the recovery of the penalties. Prosecutions under the statute are not usual at the present day.

(3) *R. v. Cole*, 1 Esp. 169, overruling *R. v. Blackman*, 1 Esp. 96.

defendants, one of them may sometimes be so circumstanced as to be a competent witness: so in criminal prosecutions, one of several persons jointly indicted may sometimes be competent to give evidence either for the prosecution or for his co-defendants. Thus, upon an information by the crown against two or more, if a *nolle prosequi* be entered by the attorney general, either before or at the trial, as to one of the defendants, such defendant may be called as a witness for the crown against his co-defendant. (1) So where, upon a joint indictment against two, one had pleaded in abatement, and for want of replication judgment had been entered that he should be dismissed and discharged, he was admitted, without objection, as a competent witness, for the other defendant, being himself no longer interested in the event of the prosecution. (2)

Sometimes may become competent.

*Nolle prosequi.*

Plea in abatement and judgment.

One of several defendants may also be rendered competent in some cases, by a separate verdict at the trial. Thus, where several persons were jointly indicted for a conspiracy, Lord Tenterden permitted a verdict of acquittal to be taken in favour of two defendants, at the request of the prosecutor's counsel, before the case was opened, in order that they might be called as witnesses against the others. (3) And where, upon an indictment against several, it appears at the close of the case for the prosecution, that there is no evidence against one of the defendants, he is entitled to a separate verdict of acquittal, and may then be called as a witness on behalf of the others. (4) This is upon the same principle, that is commonly acted upon in the case of an action of tort against several defendants, where no evidence is adduced against one or more of them. It has also been decided, that upon an indictment against two defendants for an assault, one of them who had pleaded guilty, and was fined and paid the fine, might be called as a witness on behalf of the other defendant, who had pleaded

Separate verdict.

(1) Bul. N. P. 285. Per Lord Hardw. Rep. temp. Hardw. 163, and see per Lord Hardwicke, Ward v. Man, 2 Atk. 229.

(2) R. v. Shearman and others, Rep. temp. Hardw. 303.

(3) R. v. Rowland and others, Ry. & Mo. N. P. C. 401. See

*ante*, where some of these cases have been already noticed in treating of the admissibility of accomplices.

(4) R. v. Mutineers of the Bounty, cit. 1 East, 313. R. v. Bedder, 1 Sid. 237. Hawk. P. C. c. 46, s. 98.

not guilty; the trial being at an end with respect to the witness. (1)

Judgment by  
default.

In *R. v. Lafone*, (2) a defendant, who had suffered judgment by default to an indictment for a misdemeanor, was tendered as a witness at the trial on behalf of another defendant who had pleaded, but Lord Ellenborough said, he had never known such evidence admitted, and he rejected the witness. "The admission of such evidence," said his Lordship, "might be extended to every other criminal case, and thus one of the party who suffers judgment by default may protect the rest: there is a community of guilt, they are all engaged in an unlawful proceeding, the offence is the offence of all, not of a single individual only." (3)

(1) *R. v. Fletcher*, 1 Stra. 633.

(2) 5 Esp. 154.

(3) No authorities appear to have been cited in this case. According to the language attributed to Lord Ellenborough, the incompetency of the witness is not placed on the ground of his being interested, but upon the supposed impolicy of permitting one of several persons jointly indicted to screen the others at his own expense. This appears to be a doctrine at variance with the cases in which it has been held, that a defendant in an action of tort, who has suffered judgment by default, is competent to exculpate a co-defendant who has pleaded. (*Ward v. Heydon*, 2 Esp. N. P. C. 553. Per Le Blanc, J., 2 Campb. 333, n.) It is also to be observed, that even assuming it to be probable, that one of several parties indicted would be often desirous of protecting the rest at his own expense, it does not follow that he would be successful in

doing so, for his credit would be for the consideration of the jury. It is not easy to understand the concluding observations attributed to Lord Ellenborough. The guilt of a party who has suffered judgment by default is admitted; but the guilt or innocence of a party who has pleaded, remains to be ascertained by the verdict of the jury. To state, therefore, that there is a community of guilt, and that the offence is the offence of all, is, with regard to the defendant, who has pleaded, to assume the very question which the jury have to try; and, with regard to the witness himself, we have already seen, in treating of the evidence of accomplices, that a party who admits himself to be guilty of an offence for which another is indicted, is a competent witness for the prisoner as well as for the prosecution, unless he has been rendered incompetent by actual conviction of a crime producing infamy.

## CHAPTER VII.

OF THE RULE OF INTEREST WITH REGARD TO PERSONS NOT  
PARTIES TO THE SUIT.

**T**HE general principle, on which a witness, interested in the event of a cause, is incompetent to give evidence in support of such interest, has already been stated, and we have examined into the application of this rule, with regard to the persons who are, in general, most obviously and immediately interested in the event of a suit, *viz.* the parties to the record. We have now to consider the application of the rule with regard to ordinary witnesses.

This inquiry will be found of a more extensive and complicated description than that which has just been completed, and it is scarcely possible to reconcile the earlier cases on the subject with those of more recent date. The earlier cases were generally decided on very narrow grounds. "The old cases on the competency of witnesses," said Lord Mansfield, "have gone upon very subtle grounds: but, of late years, the courts have endeavoured, as far as possible, consistently with those authorities, to let the objection go to the credit rather than the competency of the witness." (1)

The general rule is laid down by Gilbert, C. B., in these words, "The law looks upon a witness as interested, where there is a certain benefit or disadvantage attending the consequence of the cause one way." (2) And Mr. Justice Buller, in the case of the *King v. Prosser*, says, "I take the rule to be this, if the witness can derive no benefit from the cause before the court, he is competent." (3) General rule.

(1) 1 T. R. 300. *Walton v. Shelley*, cit. per Lord Kenyon, 3 T. R. 32, and see *R. v. Bray*, Ca. temp. Hardw. 360.

(2) Gilb. Evid. 106-7.

(3) 4 T. R. 20, and see B. N. P. 284.

**Direct interest.**

In inquiring into the competency of the parties to the record in civil suits, it has been seen, that in general they are incompetent to give evidence, by reason of a direct interest in the event of the suit. Many cases arise, in which persons not being parties to the record are open to same objection. Thus, the nominal plaintiff on the record may sometimes have no real interest in the question at issue, and the action may be prosecuted solely for the benefit of a third person who is not a party to the record: and if at the trial such person were tendered as a witness in support of the plaintiff's case, he would be obviously incompetent, by reason of the direct interest which he would have in obtaining a verdict for the plaintiff; for such verdict, when obtained, would enure to his own benefit, and the witness therefore would have a much stronger interest than the plaintiff himself, in obtaining a favourable termination of the cause. The same principle would of course be equally applicable with regard to the defendant, as with regard to the plaintiff. And it would hold equally in the case of a partial, as well as an entire interest in the subject matter of the action. In all such cases there would be a certain benefit or disadvantage directly resulting to the witness from a favourable or unfavourable verdict, and he would therefore be incompetent to give evidence, by reason of this direct interest in the event of the suit.

**2. Indirect interest.**

But a direct and immediate benefit or disadvantage from the result of the suit was not the only species of interest, which at one time rendered a witness, not a party to the record, incompetent to give evidence. For until the passing of a recent statute, which has effected a material alteration in the law, in this respect, and the provisions of which will be fully stated hereafter, (1) witnesses who were neither parties to the record, nor had any direct interest in the event of the suit, were often rendered incompetent, by reason of an indirect interest in the record, with regard to some subsequent suit. This description of interest has already been adverted to, in treating of the competency of the prosecutor, or party grieved, to give evidence in a criminal prosecution; and it has been seen

(1) Stat. 3 & 4 W. 3, c. 42, s. 26, 27.



that an objection to his competency was formerly supposed to exist, on the ground that he might be able to avail himself of the record of a conviction as evidence, in support of his own interest, in some subsequent civil suit. But when it became a settled rule, that a judgment in a criminal prosecution, could in no case be used as evidence in a subsequent civil suit, on behalf of a party who had been a witness for the prosecution, the foundation of this objection failed, and the prosecutor or party grieved was held not to be disqualified by reason of this supposed indirect interest in the record. In like manner, with regard to the parties to civil suits, it will be found, upon an examination of the cases that have been decided with respect to their competency to appear as witnesses, that they are generally disqualified, by reason of a direct and immediate interest in the event of the suit, and that when they are free from this direct interest, no objection can be raised to their competency on the ground of such an indirect interest in the record. But with respect to ordinary witnesses the case was often different, and they were, in many instances, open to the objection of an indirect interest, in cases where they could derive no immediate benefit or disadvantage from the termination of the particular suit.

In treating, in a subsequent part of the volume, upon the admissibility and effect of former judgments as evidence in a subsequent suit, it will be seen, that they are in general conclusive evidence of the facts that appear to have been decided by the record, if the same question should arise again between the same parties; (1) but that they are not, in general, admissible evidence in a subsequent suit by or against a party who was a stranger to the former proceedings. To the latter branch of the rule there are, however, some exceptions, and a judgment in a civil suit may in several cases be admissible in evidence for or against a person who was not a party to the former suit. Thus, if an action be brought by or against one of several persons, who claim a customary right of common, or some other

(1) *Post*, Part II.

species of customary right, and the question of the existence and validity of the custom is determined by the record, the judgment obtained in the action would be admissible evidence in a subsequent action, for or against a person claiming under the same general customary right, although he was a stranger to the record in the former action: and if a person so situated were tendered as a witness in the first action, it was fully established that the circumstance, of the record being admissible evidence for or against his own claims in a subsequent suit, was an interest which, in general, would render him an incompetent witness. (1)

Two distinct grounds of incompetency:

1. Direct
2. Indirect

There were therefore two distinct modes, in which a person, not a party to the record, might derive a benefit or advantage from the event of the suit, and in either case he became incompetent to give evidence. "This benefit," says Lord C. J. Tindal, in a late case, (after citing the general rule in the words of C. B. Gilbert, already quoted in the text) (2) "this benefit may arise to the witness in two cases: first, where he has a direct and immediate benefit from the event of the suit itself; and secondly, when he may avail himself of the benefit of the verdict in support of his own claims in a future action. (3)

These were the only grounds, upon which a witness became incompetent from interest, and it was fully settled, by many decisions, that all other objections on the ground of a supposed interest would affect the credit of the witness only, not his competency. This was the rule laid down and acted on in *Bent v. Baker*, (4) which has always been considered a leading authority on this subject. And in a subsequent case, Lord Kenyon, referring to the rule established in *Bent v. Baker*, says, "That case laid down a clear and certain rule, by which I have ever since en-

(1) See 1 T. R. 302. 3 T. R. 32. B. N. P. 283. *Hockley v. Lamb*, 1 Lord Raym. 731. *Anscomb v. Shore*, 1 Taunt. 261. *Lord Fal-mouth v. George*, 5 Bing. 286. The rule had an exception where all the subjects of the king are in-

terested, and where no other evidence can reasonably be expected. See *Lancum v. Lovell*, 9 Bing. 470. B. N. P. 289.

(2) *Supra*, p. 71.

(3) 6 Bing. 394. *Doe v. Tyler*.

(4) 3 T. R. 27.

deavoured to regulate my opinion. The rule there laid down was, that no objection could be made to the competency of a witness on the ground of interest, unless he were directly interested in the event of the suit, or could avail himself of the verdict in the cause, so as to give it in evidence on any future occasion in support of his own interest." (1) So also Lord Ellenborough, in giving judgment in a case which has been cited in the preceding chapter, (2) recognises the authority of *Bent v. Baker* and *Smith v. Prager*, and observes, that the rule was well laid down and established in those cases, "That where a party is not immediately interested in the cause, nor has any interest in the event, in support of which the verdict in that cause may be given in evidence by him in any other proceeding institution by or against him, he is a competent witness."

A material alteration has lately been effected in the Law of Evidence, with regard to the incompetency of witnesses, on the ground of an indirect interest arising from the subsequent use of the record as evidence for or against the witness. For by the stat. 3 & 4 W. 4, c. 42, s. 26, (3) it is provided, that in cases where witnesses are objected to upon this ground, they shall nevertheless be examined, but that in such case a verdict or judgment by or against the party for whom the witness shall be examined, shall not be admissible in evidence by or against the witness, or any person claiming under him. The effect of this enactment is to remove the objection to the competency of the witness, by removing the interest out of which the objection arises. And the principle, upon which the statute is founded, appears to be in some degree analogous to that of the rule to which we have adverted in the preceding chapter, namely, that a witness in a criminal prosecution shall in no case be allowed to avail himself of a conviction, where he has himself been called as a witness in support of the indictment. In both cases the supposed interest is removed by the fact of the party appearing in the character of a witness, and as he can himself

Stat. 3 & 4 W.  
4, c. 42.  
Alteration of  
law as to indi-  
rect interest.

(1) 7 T. R. 62. *Smith v. Prager*.

(2) *R. v. Boston*, 4 East, 581,

*supra*.

(3) See the statute in the Ap-  
pendix.

derive no benefit, either directly or indirectly, from a favourable termination of the suit, no substantial objection to his competency on the grounds of interest can now be made.

The particular provisions of this statute, and the cases that have been decided upon it, will be subsequently stated. It is sufficient to observe at present, that the effect of it appears to be to remove one of the grounds of incompetency from interest which existed before the passing of the act; and to render all witnesses competent, as far as regards objections from interest, unless it can be shewn that they have a direct interest in the event of the particular suit.

In pursuing the inquiry into the present state of the law with respect to the incompetency of witnesses from interest, it is proposed to shew, in the first place, in what cases a witness will be disqualified; and secondly, in what cases he will not be disqualified from this cause; The first of these subjects of inquiry, will occupy the remainder of the present chapter; the next chapter will be devoted to the second.

#### 1. *What is such an interest as will disqualify.*

Practice before  
the statute.

The two distinct species of interest that produced disqualification, before the statute 3 & 4 W. 4, c. 42, have been mentioned, and it may contribute to the elucidation of the subject of the present inquiry, if, before the particular cases are stated in which a witness becomes incompetent according to the present state of the law, a short notice is taken of the practice antecedent to the passing of the late statute. An instance of disqualification from an immediate interest in the event of the particular suit frequently arose, in cases where an action had been brought by or against a person having no beneficial interest in the subject matter of the action, who either sued or defended merely for the benefit of a third person, and on the trial of the cause such third person was tendered as a witness for the party, who was a mere trustee on his behalf. In cases of this nature, the witness would derive an immediate benefit from a verdict in favour of the party for whom he was tendered as a witness, and would be incompetent, by

reason of this obvious and direct interest in the event of the particular suit. (1) Examples of the more remote species of interest, depending upon the use of the record as evidence, often arose, as we have observed, in the case of actions, in which questions came in issue concerning the existence and legality of some general custom set up by one of the parties to the suit, and which custom affected the rights of other persons tendered as witnesses to prove the custom. Thus, if the issue were on a right of common, which depended on a custom pervading a whole manor, a person claiming a right under this custom was incompetent to give evidence on behalf of the party to the particular suit, who relied on the existence of the custom; for although, in this case, the witness would gain no immediate benefit from the termination of the particular suit, the record in that suit would be evidence in a subsequent action by or against the witness for the trial of the same right. (2) So also in an action, in which an issue arose concerning the existence of a custom to take a certain toll from fishermen frequenting a particular cove, it was decided, that a fisherman who was not a party to the action, but who frequented the same cove, and would have been liable to pay toll under the custom, was an incompetent witness for the purpose of disproving the existence of the custom; for here also, although no immediate gain or loss could result to the witness from the immediate event of the particular suit, yet if a subsequent action were brought against himself for not paying toll, the record of the verdict in the former action would be evidence for or against the witness in the subsequent action. (3)

Such was the general state of the law before the passing of the statute 3 & 4 W. 4, c. 42, s. 26, 27, the effect of which has been, to remove the more remote species of disqualification, and to reduce all questions on the incompetency of witnesses, as being interested to the inquiry, whether or not the witness has any direct interest in the event of the

(1) See other instances of immediate interest given by Tindal, C. J., in *Doe v. Tyler*, 6 Bing. 394.

(2) See per Buller, J., 1 T. R. 302.

(3) *Lord Falmouth v. George*, 5 Bing. 286.

particular suit. It is, however, important to observe, that, before the passing of this statute, it happened not unfrequently that witnesses were so situated as to be open to objection, on the ground of an immediate interest in the result of the particular suit, and also on the ground of an indirect interest in the record for the purposes of the evidence in some subsequent suit. And as either objection was sufficient to produce disqualification, such witnesses were rejected sometimes on one ground, and sometimes on the other indiscriminately, according as either objection might be presented to the Courts. Thus, it has been decided in several cases, that a tenant in possession is an incompetent witness for the defendant, and his incompetency has been sometimes attributed to an immediate interest in the event of the particular suit, and at other times to an indirect interest in the record, as available for the purposes of evidence. In the case of *Doe v. Wilde*, (1) for instance, it was said by the Court, that the effect of a judgment for the plaintiff would be to turn the witness out of possession, and that this was an immediate interest which disqualified the witness from giving evidence for the defendant. But in other cases a tenant in possession, who had been served with a copy of the declaration, has been held an incompetent witness for the defendant, upon the ground, that a judgment for the plaintiff in ejectment would be evidence against the witness in a subsequent action brought against him for the mesne profits. (2)

In cases of the above description (and many similar instances might be given), the witness was open to both objections before the late statute, and it was then immaterial to examine minutely into the exact nature and extent of his interest; because, if it appeared clearly, that he was interested in either point of view, that was a sufficient reason for rejecting his testimony. If the witness had a direct and immediate interest, there was no occasion to have recourse to the second principle, where the interest was

(1) 5 Taunt. 183. See also *per* Cur. 6 Bing. 304; and *Doe v. Birmingham*, 4 B. & Ald. 672.

(2) *Bourne v. Turner*, 1 Stra. 632. *Doe v. Williams*, Cowp. 621. *Doe v. Preece*, 1 Tyrwh. 410.

one degree removed. (3) And so on the other hand, if it was apparent, that the verdict would be evidence for or against the witness in a subsequent action, there was no occasion to consider, whether or not he had any more immediate interest in the event of the particular suit. But, since the statute, it has obviously become necessary to consider, in all cases of this nature, whether the witness has a direct and immediate interest in the event of the suit. For if, before the statute, the objection of an indirect interest in the record was the *only* objection that could be raised against the admissibility of any particular witness, the competency of such witness will be now restored through the effect of the statute which removes this indirect interest. But if, before the statute, the witness was open to the objection of a direct interest in the particular suit, as well as that of an indirect interest in the record, the statute appears to have no effect in restoring his competency, for although it removes the latter species of interest, the former still remains behind, and will consequently produce disqualification.

We shall now proceed to shew, in what particular cases persons, not being parties to the suit, are, according to the existing law, incompetent from a direct interest in the event of of a suit.

The cases that have arisen respecting the competency of the parties to the suit, have already been considered; and it has been seen, that the plaintiff and defendant are, in most cases, disqualified on the ground of interest, and that where they have no beneficial interest in the subject matter of the action, they are, in general, disqualified on the ground of liability to costs.

Immediate interest.—Cases.

Nominal party.

The bail for the defendant are incompetent witnesses for him, being directly interested in the event of the suit; for if the verdict be given against the principal, the bail become immediately answerable, and they are immediately re-

Bail.

(3) See per Tindal, C. J., 6 Bing. 394.

Husband and  
wife.—Bail.

lieved from this liability by the effect of a verdict in his favour. (1) Upon the same principle, a person who has deposited in the hands of the sheriff, in lieu of bail, a sum of money, which by rule of Court is made to abide the event of the suit, is not competent for the defendant. (2) Whenever the husband of a witness would be incompetent to give evidence on account of his interest in the cause, it necessarily follows that the wife will also be excluded, having an unity of interest with her husband; and the wife of the bail is, therefore, incompetent to give evidence for the party, on whose behalf her husband has become bound. (3)

Bail made  
competent.

When a material witness for the defendant has become bail for him, the court will, on application, allow his name to be struck out, on the defendant adding and justifying another bail instead of the witness. (4) And even at the trial the judge will allow the witness's name to be struck out of the bail piece, if the defendant deposit with the associate, a sufficient sum, as a security for the debt and costs. (5) Of course, immediately the name of the bail has been struck out of the bail piece by competent authority, his liability ceases, and his interest is therefore removed; but his incompetency will continue, where it does not distinctly appear that his liability has terminated. Thus, where a witness stated on the *voire dire* that he was bail to the sheriff in the action, and that he did not justify, but that he had not done any thing to get discharged from the liability, which he had contracted by becoming bail, he was rejected as an incompetent witness. (6) And where an attachment had been granted against the sheriff for not putting in bail, but which was afterwards set aside on terms, one of

(1) See 1 T. R. 164, per Buller, J. *Piesley v. Von Esch*, 2 Esp. 605.

(2) *Lacon v. Higgins*, 3 Stark. N. P. C. 182.

(3) *Cornish v. Pugh*, 8 D. & R. 65.

(4) *Whatley v. Fearnley*, 2 Chit. Rep. 103. Tidd's Pr. (9th edit) 259.

(5) *Baillie v. Hole*, Mo. & Ma.

N. P. C. 289. 3 C. & P. 560. *Pearcey v. Fleming*, 5 C. & P. 503.

In the former of these cases, the sum deposited was the amount sworn to, together with a further sum to cover the costs: in the latter case double the sum sworn to was deposited.

(6) *Hawkings v. Inwood*, 4 Car. & P. 148.



which was, that the attachment should stand as a security, the bail to the sheriff were ruled to be incompetent witnesses for the defendant. (1)

A surety in a replevin bond is interested in procuring a verdict for the plaintiff, in the same manner as bail are interested in procuring a verdict for the defendant, and is, therefore, incompetent; but if his testimony be required, the courts will permit the substitution of a new surety in lieu of the witness in order that the latter may be rendered competent. (2)

Surety in replevin bond.

In the cases which have just been stated, respecting the incompetency of bail and sureties, the situation of the witness was that of a party immediately connected with the proceedings in the action, and his interest in procuring a verdict, in favour of the party for whom he has become bound, is apparent from the proceedings themselves. We shall presently proceed to notice in detail a variety of other cases, in which witnesses are incompetent by reason of a direct interest in the event of the particular suit, but where it is necessary to look beyond the proceedings for the ground of incompetency. Before doing this, it may be desirable to advert to a few leading principles upon this important and difficult subject.

Persons not parties to proceedings.

General principles.

It is a general rule, that a witness will not be incompetent on the ground of interest, unless the alleged interest be certain in its nature; for if it be a matter of uncertainty, whether the witness will gain or lose by the event of the cause, it cannot be said of him that he is in fact interested, and his testimony will therefore be received. (3)

Uncertain interest.

It is also a rule, that the interest must be a legal existing interest; if it exist merely in the imagination, or belief, or expectation of the witness, he will not be incompetent, how-

Expectation.

(1) *Piesley v. Von Each*, 2 Esp. 7 Moore, 439, S. C. N. P. C. 605.  
(2) *Bailey v. Bailey*, 1 Bing. 92.  
(3) *R. v. Cole*, 1 Esp. 98.

ever strongly the objection may be urged with respect to his credibility. (1)

**Competency presumed.**

In all cases in which an objection is raised to the competency of a witness on the ground of interest, it lies upon the party making the objection to establish its existence and validity. The competency of a witness ought to be presumed, until the contrary be clearly shewn, and in cases of doubt the Courts are always disposed to receive the witness and to let the objection go to his credibility rather than to his competency.

**Amount of interest.**

If it be made to appear clearly that the witness is directly interested in the event of the particular suit, the exact amount of his interest is immaterial, and it will make the witness incompetent, however small and inconsiderable it may be. (2) A person who loses or gains the smallest sum by the event of a suit, whatever may be his rank, fortune, or character, is as incompetent to give evidence as one who may be interested to the amount of thousands. This is the unavoidable consequence of the general rule. If interest be allowed to disqualify in any case, it must in all; as it is impossible by any scale to measure the different effects, which it may have on different minds.

**Interest in costs.**

The interest may be either in the subject in issue in the action, or in the costs; for, as we have seen, in treating of the evidence of the parties to the suit, a plaintiff or defendant, who has no actual interest in the action, but merely sues or defends for the benefit of a third party, will be incompetent, if he be liable to be called on for costs. And, of course, the same rule applies to witnesses not being parties to the suit.

**Balance of interest.**

Where the witness is so situated, that he is interested on both sides, his competency will depend upon the equality or inequality of the adverse interest. If they should be exactly

(1) See cases on this subject, *post*, sec. 2.

(2) *Burton v. Hinde*, 5 T. R. 574. *Per cur.* *Dowdeswell v. Nott*,

2 Vern. 317. There was formerly some doubt on this subject, see the cases cited as to members of corporations. *Ante*, p. 48.

equal, one will counterbalance the other, and the witness will be competent; but if there should be any excess of interest on either side, the witness will be incompetent to give evidence on the side, where there is a preponderancy of interest; it is obvious, that he is interested, to the amount of the excess, in procuring a verdict on that side.

It may be observed, that many of the cases, which might be cited in illustration of these general principles, do not belong to the present subject of inquiry, *viz.* what interest will produce disqualification, but range themselves under the next head of inquiry, *viz.* what interest will *not* produce disqualification. However, as both branches of inquiry are intimately connected, and the above division has been adopted merely for the purpose of convenience, it will be of material use to bear in mind the general principles, before laid down, while we enter in detail on the consideration of those decided cases, in which witnesses have been rejected as incompetent on the ground of interest. In some of these cases, the interest of the witness will be found to be perfectly clear and direct; in others, some nicety will be required in distinguishing between direct interest in the event of the particular suit, and interest in the record as matter of evidence: in other cases again, it will be found difficult to discover, whether the witness has any interest whatever in the event of the suit. The method, we shall in general pursue in examining these cases, will be, to commence with those in which the interest is most obvious and direct, and in which the situation of the witness approaches nearest to that of a party in the proceedings.

It has been before observed, that when an action is brought by or against a person as a trustee for another, the person who is substantially interested in the action, though not nominally a party, is incompetent by reason of a direct interest. Therefore, in an action on a policy of insurance, where the declaration averred, that the policy was made in the names of the plaintiffs as agents for the sole use and benefit of A. and B., who were

Examples.

Person interested in policy.

interested in the goods insured, neither of the persons so interested is a competent witness for the plaintiffs. And even their release to the plaintiff, of all actions for any sum recovered by them on the policy, will not restore their competency; for it must be presumed, until the contrary be shewn, that, as they are interested in the policy, the action has been brought by their authority, and that they are liable to the attorney for the costs of the action. Nor will the circumstance of the nominal plaintiffs in the action having received an indemnity from other persons, make any difference, the witness still remaining liable to the attorney in respect of the costs. (1)

Consolidation  
rule.

Collateral  
agreement.

In actions on policies of insurance where there has been a consolidation rule, an underwriter, who is a party to such rule, is of course as directly interested in the event of the particular cause, as if he were a party to the cause itself; and he is, therefore incompetent. So in a case, where the defendant in an action on a policy of insurance called another underwriter as a witness, who stated that he had paid the loss to the plaintiff, upon an undertaking that he was to be repaid in the event of this action failing, and that he had since received a letter from the plaintiff, promising to return the money on that event, Lord Ellenborough, C. J., at the trial rejected the witness. On a motion afterwards for a new trial, the Court sent the case to be re-tried, for the purpose of ascertaining more particularly the time when the undertaking was made to the witness; but on that occasion Lord Ellenborough said, "If a person, who is under no obligation to become a witness for either of the parties to the suit, choose to pay his debt before hand, upon a condition that it is to be determined by the event of that suit, he becomes as much interested in the event of that suit, as if he were a party to the consolidation rule. (2)

(1) *Bell v. Smith*, 5 B. & C. 188.

(2) *Forester v. Pigou*, 1 Maule & Selw. 9. 3 Campb. 380, S. C. The time at which a witness acquires an interest in the event of the suit may, in certain cases, be-

come material; and it sometimes gives rise to an exception to the general rule that an interested witness is incompetent. See *post*, where these exceptions are noticed.

Upon the same principle, one who is in partnership with the defendant is not a competent witness to discharge a debt, to which, as partner, he would be jointly liable. In an action for goods sold and delivered, the plaintiff having proved the sale of the goods to the defendant and to one J. S. as partners in trade, Lord Kenyon held, that J. S. could not be called for the defendant to prove that the goods were sold to himself, and that the defendant was not concerned in the purchase except as his servant, observing, that the witness came to defeat an action against a man proved to be his partner, and that by discharging the defendant he benefited himself, as he would be liable to pay his share of the costs recovered by the plaintiff in that cause. (1) In a similar action, where the plaintiff proved that the goods had been sold and delivered to the defendant, it was held that a partner of the defendant was an incompetent witness for him, to prove that the goods had been sold to the defendant and to the witness jointly, and had been paid for by them. (2) And in a late case where the action was on a bill of exchange, and the defendant called a witness who admitted that he was a co-contractor with the defendant, the Court of Common Pleas held, that the witness was incompetent, for being liable to contribution for the costs and damages in the action, he had an interest to defeat the action, or reduce the damages. (3) So also where in an action the defendant pleads the non-joinder of a co-contractor in abatement, such co-contractor will be an incompetent witness for the defendant in support of the plea. (4)

Joint interest in subject of action. Partners. Co-contractors.

Plea in abatement.

It is to be observed, that in all these cases the proposed witness admitted his own liability to the demand, which was the subject of the action, and therefore to a certain extent he appeared to be giving evidence against his own interest. But although he admitted his liability to be sued in another action, yet the object of his testimony was to defeat the plaintiff in the

Nature of the interest in these cases.

(1) *Goodacre v. Breame, Peake* N. P. C. 174.

(2) *Evans v. Yeatherd*, 2 Bing. 133. See also *Cheyne v. Koops*, 4 Esp. 112.

(3) *Hall v. Rex*, 6 Bing. 181.

(4) *Young v. Bairner*, 1 Esp. 103. *Hare v. Munn*, Mo. & Ma. N. P. C. 241, n. (a).

particular action then pending; and hence arose that direct interest in the event of the suit, which rendered him incompetent. For if the plaintiff had succeeded in the action, the witness, as partner or co-contractor, would have been liable to contribution not only for the damages recovered, but also for the costs; whereas by defeating the plaintiff the witness would not only have relieved himself from all liability in respect of the plaintiff's costs, but would also have thrown upon the plaintiff the burthen of the costs incurred by the defendant, and in respect of which the witness might also have been called on to contribute. (1)

Co-obligor of  
bond.

In an action on a joint and several bond against one of the obligors, who was surety for another, that other obligor, (the principal,) is not competent for the defendant, to prove a payment of money by himself in discharge of the bond: for he has an interest in favour of his surety to the extent of the costs of the action. (2)

Residuary legatee.—Action  
by executor.

In an action by an executor to recover a debt due to the testator, a residuary legatee is an incompetent witness for the plaintiff. (3) This incompetency does not arise from the use of the verdict as evidence in any future suit, for the witness could neither be plaintiff nor defendant in an action relating to the debt; the witness is disqualified, because he receives an immediate benefit by a verdict for the plaintiff. (4) The action is in the name of the executor, but the witness is the party substantially interested in the event. And even if the witness release all claim to the debt in question, this will not restore his competency, for he has still an interest in supporting the action in order that the costs may not be a charge on the estate. (5)

(1) See the cases in which it has been held, that a partner or co-contractor with the defendant, is competent for the plaintiff. *Post.* And see as to the effect of a release from one partner to another in restoring competency. *Post.*

(2) *Townsend v. Downing*, 14

*East*, 565. See also *Trelawney v. Thomas*, 1 H. Bl. 306. And see other cases as to incompetency from liability to costs. *Post.*

(3) *Baker v. Tyrwhitt*, 4 Campb. 27.

(4) *Per Tindal, C. J.*, 6 Bing. 394.

(5) *Baker v. Tyrwhitt*, *supra*.

In an action by an administrator against a debtor of the intestate, a person entitled to a distributive share of the estate, will not be a competent witness to support the action. (1) And it has also been ruled, that a witness so situated will not be competent for the administrator, in an action brought against him in that character. (2)

Next of kin.—  
Action by  
administrator.

In these cases, the natural and immediate effect of a verdict in favour of the executor or administrator would be, to benefit the general fund in which the witness was interested; but it will be seen hereafter, that the principle of these cases has been held not to apply to specific legatees, whether paid or unpaid, or to creditors of the testator or intestate. (3)

Specific lega-  
tees, creditors,  
&c. See post.

The situation of a bankrupt bears some resemblance, in point of interest, to that of a residuary legatee. The bankrupt is interested in increasing his estate, for his allowance under the bankrupt act, depends upon the clear amount of the funds recovered by his assignees, and the surplus, if any, after his creditors are satisfied, belongs to himself. This is an interest which, in actions by or against his assignees, renders him an incompetent witness on behalf of the assignees, for the purpose of adding to the amount of the fund, or to preserve it from diminution. (4) In order to render the bankrupt competent in such cases, he must release his allowance and surplus: and it is also necessary, that he should have obtained his certificate, without which his evidence will, in no case, be admissible on behalf of his assignees. (5)

Bankrupt.  
Incompetent  
to increase  
fund.

Necessity of  
certificate.

(1) *Matthews v. Smith*, 2 Y. & J. 426. It was also decided in this case, that a release from the witness to the administrator of all claims up to the time of executing the release would not restore competency, the right of the witness being prospective. The question of costs seems not to have been adverted to in this case. See *Ingram v. Dade*, post.

(2) *Allington v. Bearcroft*, Peake's Add. Ca. 212.

(3) *Post*, sect. 2, p.

(4) *Ewens v. Gold*, B. N. P. 43. *Butler v. Cooke*, Cowp. 70. *Ex parte Burl*, 1 Mad. Rep. 46.

(5) See *Dixon v. Purse*, Peake's Add. Ca. 187. *Masters v. Drayton*, 2 T. R. 496. *Goodhay v. Hendry*, Mo. & Ma. 319. See also *Tennant v. Strachan*, ib. 378, where Lord Tenterden refused to postpone a trial on the ground that the bankrupt, whose testimony was wanted, would shortly become com-

Second commission.

Where there has been a second commission against the bankrupt, and he has not paid fifteen shillings in the pound, he will not be a competent witness for his assignees, although he has obtained his certificate and released his allowance and surplus; for his future effects remain liable until payment of fifteen shillings in the pound, and he is therefore interested in increasing the fund, in order to relieve himself from this liability. (1)

Incompetent to support or defeat fiat.

There is another case, in which a bankrupt is wholly incompetent to give evidence in any action by or against his assignees, notwithstanding he may have obtained his certificate and released his surplus and allowance: this is, where the bankrupt is called for the purpose of proving any fact, which is material either to support, or to defeat, the fiat issued against him. (2) The doctrine, that a bankrupt is incompetent to give evidence in support of his commission, has been sometimes referred to the ground of interest; it has been said, if the fiat or commission is not good, the certificate and all other proceedings are void, and the bankrupt will be again liable to his debts. (3) If, however, this were

Reason of the rule.

petent, by the Lord Chancellor allowing his certificate, which had already been signed by a sufficient number of creditors.

(1) *Kennett v. Greenwollers*, Peake's N. P. C. 3. 6 Geo. 4, c. 16, s. 127. The same principle applies to a party who has become bankrupt after having compounded with his creditors. See the words of the section above referred to. But where the composition has not been general, but has been limited to particular creditors only, the objection will not arise. *Roberts v. Harris*, 2 C. M. & R. 292. See *Norton v. Shakespeare*, 15 East, 619.

(2) The following are some of the principal cases on this point. That a bankrupt is incompetent to prove his own act of bankruptcy. *Field v. Curtis*, 2 Stra. 828. *Ewens v. Gold*, B. N. P. 40. Per Lord Kenyon, *Oxlade v. Perchard*, 1 Esp. 288. Per Lord Ellenborough, *Hoffman v. Pitt*, 5 Esp. 25. *Wyatt*

*v. Wilkinson*, 5 Esp. 187. That a bankrupt is incompetent to prove the petitioning creditor's debt. *Cross v. Fox*, 2 H. Bl. 279, n. (a). *Flower v. Herbert*, *ib.* 279, n. (a). *Chapman v. Gardner*, 2 H. Bl. 279. That a bankrupt is incompetent to disprove the alleged act of bankruptcy, or to explain an equivocal act. *Hoffman v. Pitt*, 5 Esp. 22. *Binns v. Tetley*, McLel. & Y. 404, in which case all the authorities were reviewed.—*Sayer v. Garnett*, 7 Bing. 103. In *Oxlade v. Perchard*, 1 Esp. 287, Lord Kenyon had ruled differently, and had considered the bankrupt admissible to explain an equivocal act, but in *Sayer v. Garnett*, 7 Bing. 104, Park, J., said, that Lord Kenyon afterwards changed the opinion he had there expressed.

(3) See by Lord C. J. Ryder, in *Flower v. Herbert*, 2 H. Bl. 279, n. (a.), by Bayley, J., and Holroyd, J., 2 B. & C. 18, 19.



considered as the sole foundation of the rule, it would appear to follow, that the same ground which disqualified a bankrupt from giving evidence to support his commission, would render him competent to defeat it. But it seems to be pretty clear that in either case the interest of the bankrupt, one way or the other, will depend entirely upon circumstances. A bankrupt has frequently an interest in supporting a commission or fiat, but he has also as frequently an interest in defeating it, where such is his object and desire. (1) The rule in question, therefore, seems to have been considered as resting not entirely upon the ground of interest, but partly upon considerations of policy and convenience. It would often be exceedingly difficult to discover, when the bankrupt is, and when he is not interested, in supporting or defeating his commission. And if his testimony were generally admitted, he would often be called on to make statements of matters resting in his own knowledge alone, and the proceedings under fiats of bankruptcy would be rendered generally insecure. (2) Whatever may have been the foundation for the rule, at all events the practice on the subject has been fully settled, and it is clear, the bankrupt cannot be called either to affirm, or disaffirm his bankruptcy, nor, if called and examined for any other purpose, can he be asked on cross-examination any questions as to facts, which are material to support or defeat the fiat. (3)

The objection of a direct interest in increasing the fund of his estate, which, in general, disqualifies a bankrupt from giving evidence in behalf of his assignees, applies also to the case of a person who has taken the benefit of the insolvent act. (4) And as the future effects of an insolvent are liable to his creditors under the judgment, which the act directs to be

Insolvent  
debtor.

(1) Per Tindal, C. J., 7 Bing. 104.

(2) *Ibid.*

(3) *Binns v. Tetley*, McLel. 397. *Sayer v. Garnett*, 7 Bing. 103. The rule is restricted to evidence affirming or disaffirming the bankruptcy, and will not be extended to exclude the bankrupt from giv-

ing evidence of facts, which in themselves are not material to the validity of the fiat. See *Reed v. James*, 1 Stark. N. P. C. 134. *Morgan v. Prior*, 2 B. & C. 14, *post*.

(4) *Rudge v. Ferguson*, 1 Car. & P. 253. *Wilkins v. Ford*, 2 Car. & P. 344.

entered against him, he will not be rendered a competent witness by releasing his surplus to his assignee. (1)

Creditor of  
bankrupt or  
insolvent.

In the case of bankruptcy or insolvency, the interest of the bankrupt or insolvent in the fund is of the nature of a residuary interest, being subject to the rights of the creditors, the persons primarily interested in the fund which may be realized by the assignees. The amount of the creditors' dividend must depend upon the amount of the fund, and a creditor is an incompetent witness for the purpose of increasing the estate, on account of this direct interest in the event of the suit. (2) He cannot, therefore, give evidence to deprive the bankrupt of his allowance. (3)

The creditor of a bankrupt is also interested in supporting the bankruptcy, for the effect of the bankruptcy is to appropriate the whole estate and effects of the bankrupt towards the immediate satisfaction of his creditors. A creditor is, therefore, an incompetent witness to support the fiat, and it is immaterial, whether he has or has not availed himself of the right of proving under the bankruptcy. (4) It is clear that the petitioning creditor is incompetent to prove the fiat regularly sued out, for (independently of the objection which applies to other creditors) he gives a bond to the Chancellor, conditioned to establish the fact, upon which the validity of the fiat depends. (5) The interest of other creditors, as we shall hereafter see, may be removed by a release to the assignees: and if a creditor has sold his debt, or agreed to sell it, his interest will be extinguished. (6) The cases relative to the competency of a bankrupt, of a creditor to diminish the fund, and of a creditor to reduce the amount of his own debt, or to defeat

(1) *Delafield v. Freeman*, 6 Bing. 294. 4 Car. & P. 67, S. C. *Rudge v. Freeman*, *supra*. See stat. 7 G. 4, c. 57, sect. 57.

(2) *Shuttleworth v. Bravo*, 1 Stra. 507.

(3) S. C.

(4) *Adams v. Malkin*, 3 Campb. 543. *Crooke v. Edwards*, 2 Stark. 303, overruling *Williams v. Ste-*

*vens*, 2 Campb. 301, and see 1 Rose, 392, n. *Ex parte Malkin*, 2 Rose, 27. *Ex parte Osborne*, 2 V. & B. 177.

(5) *Green v. Jones*, 2 Campb. 411.

(6) See *post*. And *Granger v. Furlong*, 2 Bl. R. 1273. *Heath v. Hall*, 4 Taunt. 326.

the commission, will be stated when we come to examine, in what particular cases a witness will not be disqualified by interest. (1)

The next class of cases which we shall proceed to notice, are those in which witnesses have been rejected on the ground of interest in actions relative to real property. Interest in land.

It has been seen, that in an action of ejectment, a tenant in possession is incompetent for the defendant, by reason of an immediate interest in the event of the suit; (2) for the verdict and judgment in the action would have the effect of turning him out of possession immediately. (3) So also, if a plaintiff agree with a witness, that, in case he recovers the lands, he will grant the witness a lease of them for so many years, this excludes his evidence; for he would have a fixed and certain advantage by the event of the verdict. (4) Upon the same principle, a witness has been rejected, who, if the plaintiff failed in the action, was to repay a sum of money in his hands belonging to the plaintiff, but was not to repay any part of it, if the plaintiff succeeded. (5) Tenant in possession in ejectment.  
  
Agreement for lease.

In ejectment brought by a tenant in tail to try the validity of a common recovery suffered of the lands in dispute, a remainder man, after the tenant in tail, is incompetent to give evidence for the latter; for by recovering in the ejectment, the tenant in tail would be in as of his former right, and the witness would thereupon acquire a vested interest in the remainder in tail. As the effect, therefore, of the verdict would be to re-vest the remainder in the witness, he has a direct and immediate interest which renders him incompetent. (6) So also in a *quare impedit* respecting the right of presentation to an advowson, which was claimed by the defendant through his Remainder man.  
  
  
  
  
  
  
Tenant by curtesy.

(1) See *post*.

(2) *Ante*. p. 78.

(3) 6 Bing. 394. 5 Taunt. 183.

(4) Gilb. Evid. 108.

(5) *Fotheringham v. Greenwood*,  
1 Stra. 129.

(6) *Doe v. Tyler*, 6 Bing. 390.  
*Smith v. Blackham*, 1 Salk. 283.  
And see per Lee, C. J., *Commings v. The Mayor of Oakhampton*,  
*Sayer*, 45.

mother, it was held, that the father of the defendant, who was tenant by the curtesy of the mother's property, was an incompetent witness on the defendant's behalf, on the ground that he had a direct interest in the result of the cause. (1) So also, a devisee, who takes under a will a vested interest in the testator's estate, has been considered incompetent to support the will in an action of ejectment brought by another devisee against the heir. (2) The ground of these cases does not, however, operate to prevent an executor, taking a pecuniary interest under a will, from giving evidence to support the will in an action of ejectment brought by the heir at law; for the verdict against the plaintiff would only have the effect of establishing the will as to the real property, and the witness would have no immediate interest in the termination of that suit; and even before the stat. 3 & 4 W. 4, c. 42, a witness so situated was not disqualified by reason of any indirect interest in the record, since the judgment would not be evidence in the Ecclesiastical Court upon a question, whether the will were good as to the personalty. (3) Upon the same principles, a *legatee* of personal estate seems also to be competent in such a case. An heir apparent is also competent upon any question concerning the lands, for the heirship is no interest, but a mere contingency. (4)

Party entitled  
to dower.

It may also be observed here, that a claim to an estate or interest in land, on the part of a witness in an action of ejectment, will not in all cases disqualify. Thus in the recent case of *Doe v. Maisey*, (5) which was an ejectment brought to recover premises which the defendant claimed as heir at law to his father, the defendant's mother was tendered as a witness for him, and was objected to on the ground, that her evidence would tend to establish for her a title to dower; but the Court of King's Bench, after time taken to consider, held, that she had

(1) *Gully v. The Bishop of Exeter* and another, 5 Bing. 171.

(2) See *Pyke v. Crouch*, 1 Lord Raym. 730, where one of the points resolved was, that a *legatee* is incompetent to prove a will. In *Hel-liard v. Jennings*, 1 Lord Raym. 505, on an issue of *devisavit vel*

*non*, it was assumed as a clear proposition that a *devisee* was not competent.

(3) *Doe v. Teage*, 5 B. & C. 335.

(4) See the following section.

(5) 1 Barn. & Ad. 439. See *Gully v. Bishop of Exeter*, and *Doe v. Tyler*, *supra*.

no legal interest in the event of the suit, and was competent. Lord Tenterden, in delivering the judgment of the Court, said that the judgment in the action would be no evidence of her husband's seisin; and that if he was seised, she was entitled to dower, whether the premises were in the hands of the lessee of the plaintiff or of the defendant. (1)

We have seen, in actions by or against corporations respecting the lands of the corporation, that individual members are incompetent, when they have an interest as members of the corporation in the lands which are the subject of the action. So also, in an action of trespass brought by the tenant of a corporation, in which a question arose respecting the right of the corporation to inclose the *locus in quo*, against the defendant who claimed a right of common thereon, freemen of the corporation were held incompetent for the plaintiff, to prove that there was a sufficiency of common left, although the rent was nominally reserved to the mayor and bailiffs alone. (2) It was objected in this case, that if any interest existed in the witness, it was too minute to form a ground of incompetency, and it is obvious, that the same objection might be raised in most cases of a similar description, and in many of those which have been before stated in the text; but the principle was fully settled by that case, and has ever since been adhered to, that if there be any amount of interest, the objection must prevail, however small it may be in reality. And in an action against officers of a corporation, members of the corporation have been held not competent witnesses on the part of the defendant, in proof of a custom to exclude strangers from trading, part of a penalty, imposed by a bye-law made to enforce such custom, going to the corporation. (3)

Corporation  
interest in  
land.

On the trial of an issue, whether the owners of property within a particular district are liable by immemorial usage to

Charge on  
land.

(1) *Ibid.* 440. It would seem that the widow assisted her case for dower by her evidence.

(2) *Burton v. Hinde*, 5 T. R. 174.

(3) *Davis v. Morgan*, 1 Tyrwh. 457. The law respecting customs of exclusive trading has since been altered.

Rateable inhabitant.

Rated inhabitant.

the charge of repairing a chapel, an owner of property within the district was held incompetent to disprove the liability, (although he neither resided nor was rated in the district,) having leased his property to a tenant who was bound to pay the rent without deduction: the owner was immediately interested in removing such a permanent charge, and thus to improve the value of his estate. (1) In a subsequent case, upon an issue whether a messuage was situated within a chapelry, it was determined that an occupier of property within the district, who was not actually rated, was competent to prove, that it was so situated; and although the decision proceeded chiefly upon the operation of the statute of the 54 Geo. 3, c. 170, s. 9, in restoring competency in such cases, and which statute will be partially noticed hereafter, yet the Court expressed an opinion that as the witness was not actually rated, but only rateable, he was competent at common law. (2) A rated inhabitant of a parish is clearly incompetent, on the general principle, to give evidence for the defendant in an action against the surveyor of the highways, in support of a custom to take materials from the sea beach for the purpose of repairing the road; for if such custom were established, the highways of the parish would be repaired at little expense, and the highway rates be thereby diminished. (3) Nor is the witness rendered competent in such a case by the statute 54 Geo. 3, c. 170, s. 9. (4) So also in an action to recover a sum, alleged to be due to the plaintiff for attending a pauper, against an overseer, who defends on the part of the parish, a rated inhabitant is an incompetent witness for the defendant; (5) for if the plaintiff recover the amount claimed, it would be a charge on the rates; and the witness is not rendered competent by the above mentioned statute, because the question in the action is not "a

(1) *Rhodes v. Ainsworth*, 1 B. & Ald. 87. See *post* C. as to the effect of the rule by statute 54 Geo. 3, c. 170, s. 9, upon questions of this description.

(2) *Marsden v. Stanfield*, 7 B. & C. 815, 818. See *Rex v. Kirdford*, 2 East, 559.

(3) *Oxenden v. Palmer*, 2 B. &

Ad. 236. Per Lord Tenterden, S. C. p. 242.

(4) *S. C.* and *R. v. Bishop Auckland*, 1 Ad. & Ell. 744. See this statute, *post*, and the cases in which it restores competency.

(5) *Tothill v. Hooper*, 1 Mood. & Rob. N. P. C. 392.

matter of rates or cesses of the parish," within the meaning of the act of parliament. (1)

In an action of replevin, a party under whom the defendant makes cognizance is, in general, an incompetent witness for the defendant, being the person really interested in the event of the cause, and in truth the substantial defendant. And in a case where there were two cognizances, one under the party beneficially interested, and the other under a trustee for him; the evidence of the latter was rejected, notwithstanding the absence of any beneficial interest on his part in the premises. (2) In the case of *Upton v. Curtis*, (3) it appears that a party, under whom cognizance was made, was considered incompetent for the defendant, although that particular cognizance had been abandoned.

Replevin  
cognizance.

But it has been settled in a very recent case, that where distinct cognizances are made under different parties, who do not appear to be in any manner connected in interest, if one of the cognizances be abandoned at the trial, the party, under whom it is made, is a competent witness for the defendant. (4) Lord Denman in delivering the judgment of the Court, after observing there was reason to suppose that the facts of the case of *Upton v. Curtis* were not reported with perfect accuracy, said, the Court were of opinion, that the offer to abandon the issue, joined on the cognizance under the witness, was tantamount to consenting that a verdict should be found for the plaintiff on that issue. (5)

Present rule.

Distinct cogni-  
zances.

It is now proposed to notice an important class of cases, in

Liability over.

(1) See the words of the act, and per Lord Tenterden, 2 Barn. & Ad. 243-4.

(2) *Golding v. Nias*, 5 Esp. N. P. C. 272. In a prior case, it appears that the wife of a party under whom cognizance was made, was admitted as a witness for the defendant; but no objection seems to have been taken, or any question raised as to her competency. *Johnson v. Mason*, 1 Esp. N. P. C. 89.

(3) 1 Bing. 210.

(4) *King v. Baker*, 2 Ad. & Ell. 333.

(5) 2 Ad. & Ell. 339, 340. In the case of *Hart v. Horn*, 2 Campb. 92, it was ruled that the declarations of a party under whom cognizance had been made, were inadmissible in evidence for the plaintiff. For another example of direct interest, see *Bland v. Ansley*, 2 N. R. 331.

which witnesses have been rejected as incompetent to give evidence in a particular suit, on account of their liability to a subsequent action by one of the parties to that suit. Thus, in the case of actions against a master or principal, founded on the alleged misconduct of a servant or agent of the defendant, such servant or agent has been generally rejected as an incompetent witness for the defendant to disprove his own misconduct. In the numerous cases of this nature, which occurred before the passing of the statute 3 & 4 W. 4, c. 42, the rejection of the witness almost always proceeded on the ground of an indirect interest in the record with reference to a subsequent suit: for if the servant or agent has been guilty of the misconduct imputed to him, he will in general be liable to make good all damages sustained by the master or employer in consequence of such misconduct, and may be compelled by the latter, through the medium of an action, to repay any damages and costs recovered by the party injured. And although the record of the first action would not be evidence in the second for the purpose of establishing *the fact of the misconduct of the witness*, yet it would be admissible for the purpose of shewing the *quantum of damage* sustained by the master or employer in consequence of the witness's misconduct, after the fact of such misconduct had been proved by other evidence. (1) Now it has been seen, that, before the statute of the 3 & 4 W. 3, c. 42, it was a settled general rule, that a witness was incompetent to give evidence in any suit, where the record of the proceedings in that suit would be evidence for or against himself in a subsequent action against him; and as it was clear, that in these cases the defendant in the first action might produce the record thereof, as evidence in a subsequent action against the servant or agent, the latter when tendered as a witness in the first action, has generally been rejected upon the ground of this indirect interest in the record. Thus, in the case of *Green v. The New River Company*, (2) which was an action to recover damages sustained by the plaintiff, through the alleged misconduct of a servant of the defendants, the servant was held an incompetent witness for the defendants, to dis-

(1) 4 T. R. 589.

(2) 4 T. R. 589.



prove his own negligence. It was said by the Court, that although a tradesman's servant is permitted to prove the delivery of goods on behalf of his master, this is an exception to the general rule, proceeding merely from necessity; (1) and that this exception would not extend to actions arising from the misconduct of coastmen and sailors, in which cases the verdict against the proprietor might be given in evidence in a subsequent action by the latter against the servant, as to the *quantum of damages*, though not as to the fact of the injury; and so in the case then before the Court, the verdict might be given in evidence in an action by the defendants against the witness, and therefore he was incompetent without a release. (2) So also in an action against a coach proprietor for negligence in the management of the coach, the guard, who appeared to be implicated in the alleged mismanagement, has been considered incompetent, without a release. (3) In an action against the captain and owner of a vessel for an injury occasioned by imputed mismanagement of the vessel, a pilot, who had the control of the vessel at the time, has been also considered incompetent to give evidence for the defendant. (4)

Upon the same principle it has been ruled, in an action against a principal for misconduct in the purchase of certain goods, that a broker, who had been employed by the defendant to make the purchase, was incompetent to disprove negligence in the transaction. (5) And in an action for an excessive distress, the broker, who made the distress, has been considered incompetent to prove that it was not excessive. (6)

In like manner, in an action against a sheriff for a false return, the sheriff's officer, who has given security for the due execution of process, (and is consequently liable over to the sheriff in case of misconduct,) has been adjudged to be an incompetent witness

(1) See *post* Ch. Exceptions as to the rule of incompetency from interest.

(2) 4 T. R. 590.

(3) *Whitmore v. Waterhouse*, 4 Car. & P. 383.

(4) *Hawkins v. Finlayson*, 3 Car. & P. 305.

(5) *Gevers v. Manwaring*, Holt, 139.

(6) *Field v. Mitchell*, 6 Esp. 71.

Assistant.

to prove the correctness of the return. (1) But in a case, where in an action of this nature, an objection was made to the competency of an assistant to the sheriff's officer, upon the ground, that although the witness was not immediately liable to the sheriff, he was liable to his own employer, the officer, and that in an action against the officer the sheriff might give in evidence the record in the first action, and that the record of the second action would be evidence for the officer in a subsequent action against the witness, Lord Tenterden held, that this circuitry of interest was no legal ground of exclusion. He observed, that the rule established and acted upon was, that, in order to exclude a person called as a witness, the verdict must be evidence for or against him, and that an interest beyond this was too remote to establish incompetency. (2) However, the officer himself was rejected by the same learned judge as incompetent for the sheriff, even where he had received an indemnity from the execution creditor, and had not employed the attorney for the defence; on the ground, that, if there should be a verdict against the sheriff, the liability of the officer would be certain, and that he might never get paid on his indemnity. (3)

Landlord receiving rent from sheriff.

It has also been decided, in an action against the sheriff for a false return to a *fi. fa.*, which stated that he had paid a sum of money to the landlord of the premises for arrears of rent, that the landlord is incompetent to prove the rent due; for if the action were to succeed, the witness would be liable to an action at the suit of the sheriff, in which the judgment in the former action would be evidence of special damage. (4) In this last case, it will be observed, the witness did not stand exactly in the situation of an agent employed by the defendant to do a particular act and misconducting himself in the course of his employment, but the principle, upon which he was rejected, was the same as in the preceding cases, namely,

(1) *Powell v. Hord*, 2 Lord Raym. 1411. 1 Stra. 650, S. C.

(2) *Clark v. Lucas, Ry. & Mo.* N. P. C. 32.

(3) *Whitehouse v. Atkinson*, 3 Car. & P. N. P. C. 344.

(4) *Keightley v. Birch*, 3 Campb. 521.

that there would be a legal liability over to the sheriff arising from the alleged misconduct of the witness in claiming rent, which, it was contended, was not really due; and in a subsequent action by the sheriff against the witness, the record of the verdict would be admissible in evidence to enforce such liability.

In most, if not in all the cases of this nature, which arose after the case of *Green v. the New River Company*, and before the passing of the late statute of the 3 & 4 W. 4, c. 42, witnesses, liable over to the defendant, were held incompetent to give evidence for him, for the reason stated by the court in the last-mentioned case: namely, that the verdict might be given in evidence to prove the *quantum of damage*, in a subsequent action against the witness. This was a sufficient ground for the rejection of the witness before the statute 3 & 4 W. 4, c. 42; but the 26th and 27th sections of that statute appear, (as we have already observed), to have produced the effect of removing all objections to the competency of witnesses, which are founded on an indirect interest in the record, as being admissible evidence in a subsequent action. And it therefore becomes material to ascertain, whether, in the class of cases now under consideration, the witness is or is not liable to objection, on the ground of a direct interest in the event of the particular suit.

Nature of the interest in these cases.

It will be observed, that in all the cases which have been above cited and referred to, the witness was tendered on behalf of the *defendant*. And if no objection to his competency could have been made, except on the ground of the subsequent use of the verdict as evidence against him, it would seem to follow, that in all actions of a similar description, a servant, or agent, or other person liable over to the *plaintiff*, would be a competent witness, on his part, to prove that the injury complained of arose from negligence or improper conduct on the part of the defendant; because, whatever might be the result of the action, the verdict could in no case be used as evidence for or against such witness for the plaintiff in any subsequent proceeding.

It has, however, been decided in several cases, that the

Servant of the  
plaintiff incompetent.

Immediate  
interest.

Captain of  
ship—when  
incompetent.

plaintiff's servant or agent is equally incompetent to give evidence on behalf of the plaintiff, as the defendant's servant or agent is to give evidence on behalf of the defendant. Thus, in *Miller v. Falconer*, (1) which was an action against the defendant for negligently running against the plaintiff's cart with a dray, the plaintiff's servant, who was driving the cart, was objected to as incompetent, on the ground that *prima facie* he was himself answerable to his master, and that he was interested in fixing the liability on the defendant, and the objection was allowed by Lord Ellenborough, who observed, that the witness certainly came to discharge himself, and therefore was incompetent without a release. And the same point was subsequently decided by the Court of Common Pleas, in the case of *Morish v. Foote*. (2) In this last case it was contended, that the witness was competent, because no use whatever could be made of the verdict as evidence against him in a subsequent action; and that the case was distinguishable from that of *Green v. the New River Company*, on the ground, that there the witness was called on the part of the defendant, but here he was tendered on the part of the plaintiff; however, the court decided, that the witness was incompetent, as having a direct interest in the event of the suit; for if the plaintiff obtained a verdict, the witness was placed in a state of security. In giving judgment in this case, Gibbs C. J., referred to and recognised a prior *nisi prius* decision, in which the same principle had been acted on by Lord Kenyon. (3) In the latter case the action was upon a policy of insurance on the plaintiff's goods, and the right to recover depended upon the question, whether the ship was seaworthy or not. In order to prove the vessel was staunch, the plaintiff called the owner, who was objected to, on the ground that he exonerated himself from all liability by fixing the defendant. On the other hand it was contended, that it had been settled by the case of *Bent v. Baker*, that a witness was competent in all cases, except where the verdict could be used as evidence for or against him. But Lord Kenyon said, it

(1) 1 Campb. 251.

(2) 8 Taunt. 434. 2 Moore, 508.

(3) *Rothero v. Elton*, Peake, 84.  
See per Gibbs, C. J., 8 Taunt. 457.  
See also *De Symonds v. De la*

*Cour*, 2 N. R. 374, in an action on policy of insurance, the captain is incompetent to give evidence on the question of deviation.

was held in *Bent v. Baker*, that a witness was incompetent, not only in cases where the verdict would be evidence for or against him in another suit, but also where he was directly interested in the event of the particular suit; and that in the case then before him the witness was directly interested in procuring a verdict for the plaintiff. (1) So also in a later case it was ruled at *nisi prius*, by Best, C. J., that in an action for an injury to a stage coach by a cart, the coachman was an incompetent witness for the plaintiff without a release; (2) and in two more recent cases of a similar nature the same point has been ruled by Lord Denman and Lord Chief Justice Tindal. (3)

Driver of stage coach.

It appears to be established by these cases, that where a witness is so connected with the question in dispute in a particular action, that a verdict for the plaintiff would entirely relieve the witness from a liability over to a subsequent action which the plaintiff might bring against him if the defendant were to succeed, such witness will be incompetent to give evidence on behalf of the plaintiff, by reason of a direct interest in the event of the cause. And it is scarcely necessary to observe, that if there be this direct interest with regard to a witness liable over to the plaintiff, the same species of interest must exist with regard to a person who may be liable over to the defendant, and who is tendered as a witness on his behalf. In both cases a verdict in favour of the party for whom the witness is called, has, in general, the same effect, with regard to the state of security in which it places the witness. (4) And in the case of a witness called on the part of the defendant, the liability is generally more extensive, than in the case of a witness called for the plaintiff; for if a defendant is sued in consequence of the misconduct of some person who is liable over to him, he may in general recover

Result of cases.  
Immediate interest, when witness called for plaintiff.

Or defendant.

Costs.

(1) *Peake*, 85. See also *Fox v. Lushington*, *ib.* 85, n. S. P.

(2) *Kerrison v. Coatsworth*, 1 C. & P. 645.

(3) *Wake v. Lock*, 5 Car. & P. 454. *Sherman v. Barnes*, 1 Moo. & Rob. N. P. C. 69. In both these cases, the authority of *Morish v. Foote*, *supra*, was expressly recognised.

(4) There may be some cases in

which a witness, called for the defendants, will not be placed in entire security by a favourable verdict, but may be liable himself to a subsequent action at the suit of the plaintiff. These cases, however, can be but few in number, and the same state of things may sometimes occur with regard to witnesses called for the plaintiff.

against such person the costs of the action, by way of damages; (1) but where a plaintiff brings an unfounded action, and is defeated on the ground of misconduct on the part of his own agent, or other person liable over to him, he cannot claim the costs of such action as a necessary consequence of the act or misconduct of the party so liable over to him. (2)

Other cases of incompetency from liability over.

There are several other cases remaining to be noticed, in which witnesses have been rejected as incompetent, on the ground of an interest arising from a liability over to one of the parties to the suit; in some of which cases the interest is sufficiently clear, but in others its precise nature and extent are not easily discoverable; neither, indeed, is it very easy to reconcile some of them with the principles upon which the courts have acted in deciding others.

Sale of land—  
vendor with  
warranty.

In an action between the vendor and purchaser of an estate, in which the title to the estate comes in question, a person who had previously sold the estate, and is liable to the vendor, if the title should prove defective, is incompetent to give evidence in support of the title. (3) But if the former vendor sold the estate without any covenant for good title or warranty, he will be competent; (4) for in this case the witness is under no liability.

Sale of goods—  
vendor of horse  
with warranty.

It has been decided, that if the buyer of a horse warranted re-sell him with a warranty, and upon being sued offers the defence of the action to the person from whom he bought, who does not interfere, he may recover against that person the costs of the action, as part of the damage occasioned by the breach of warranty. (5) In the case of *Briggs v. Crick*, (6)

(1) See the cases relative to accommodation bills, *post*, and *Lewis v. Peake*, 7 Taunt. 153. *Neale v. Wylie*, 3 B. & C. 533.

(2) See per Tindal, C. J., 1 Bing. N. C. 688. There are many cases in which a witness is so situated, that he may be liable to be sued by either the plaintiff or defendant, according to the result of the trial; and in these cases where the

liability is equal on both sides, the witness will be competent; but it happens, not unfrequently, that the scale is turned by a preponderating liability to the defendant in respect of the costs of the action. See *post*.

(3) 2 Roll. Abr. 685.

(4) *Busby v. Greenslade*, 1 Stra. 445.

(5) *Lewis v. Peake*, 7 Taunt. 153.

(6) 5 Esp. 99.

indeed, it is said to have been ruled, that a former proprietor of a horse, who had sold with a warranty, was competent to prove the soundness, without a release: and in a later case Lord Tenterden appears to have ruled to the same effect. (1) But in a very recent case at *nisi prius*, in which the same question arose, and the case of *Briggs v. Crick* was cited, in support of the witness's competency, Mr. Justice Alderson was of opinion, that as the effect of a verdict would be to relieve the witness from an action at the suit of the defendant, to whom he had sold and warranted the horse, he was incompetent to give evidence on the defendant's behalf. (2)

In the case of *Nix v. Cutting*, (3) it was decided, in an action of trover for a horse alleged to be the plaintiff's property, that a witness was competent to prove, on the part of the defendant, an agreement between the plaintiff and the witness, that the latter should take the horse as a security for a sum of money due to him from the plaintiff, and should sell it if the money were not repaid on a day certain, and that, on default of payment, the witness sold the horse to the defendant: an objection was taken against the witness, that by selling the horse he had warranted it to the defendant to be his property, to whom he would be liable over if the plaintiff succeeded in the action; but the court held, that this was not a sufficient objection, and said, that as between the witness and the plaintiff, and the witness and the defendant, the verdict obtained upon his testimony in the cause would be of no avail. (4) So also in the case of *Ward v. Wilkinson*, (5) it was decided, in an action of trover for goods in the defendant's possession which were claimed by the plaintiff, that a witness was competent to prove that the goods belonged to him, and had been fraudulently obtained from him by the plaintiff; because the verdict could not be evidence for or against the witness in any subsequent action: and the court in this case recognised the decision of *Nix v. Cutting*. (6) But it does not appear, that in this case of *Ward v. Wilkinson* any

Witness to  
prove property  
in himself.

(1) *Baldwin v. Dixon*, 1 Mood. & Rob. 59.

(2) *Biss v. Mountain*, 1 Mood. & Rob. 302.

(3) Taunt. 18.

(4) 4 Taunt. 20.

(5) 4 B. & Ald. 410.

(6) See per Holroyd, J., 4 B. & Ald. 412, 413.

question arose as to incompetency, by reason of a liability over to either of the parties, for the witness had not sold the goods to the defendant, (as in the former case,) but was called to prove that they actually belonged to himself at the time of the trial.

**Actions on bills of exchange.**

There are several cases, of actions on bills of exchange, in which witnesses have been rejected as incompetent, from being liable over to one of the parties to the suit. The general rule is, that, in actions brought against parties to such negotiable instruments, other parties to the bills are competent to give evidence, either for the plaintiff or defendant; and their competency depends upon the principle already adverted to, which will be more particularly noticed in the ensuing chapter, namely, an equal liability on either side. But an exception to this rule prevails in the case of actions on accommodation bills, in which the party, for whose accommodation the defendant has put his name to the bill, is incompetent to give evidence to defeat the plaintiff, upon the ground that the witness will be liable over to the defendant, not merely for the amount

**Liability to costs—accommodation bills.**

**Jones v. Brooks.**  
**Drawer incompetent for accommodation acceptor.**

of the bill, but also for the costs of the action. Thus in *Jones v. Brooke*, (1) a leading authority on this subject, in an action against a party who had accepted a bill for the drawer's accommodation, it was held, that the drawer was incompetent, on the part of the defendant, to prove that the plaintiff held the bill on an usurious consideration. It was argued in this case, that the drawer was indifferent, as having an equal liability on either side; for if the defendant succeeded, the witness would be liable to the plaintiff (the holder), and if the plaintiff succeeded, the witness would be liable to the defendant, who had accepted the bill for his benefit. But the Court said, that the witness had an interest to protect the acceptor, to whom he would be liable, not only for the amount of the bill, but also for all damages which the acceptor might sustain by being sued for it: the drawer of an accommodation bill being bound to indemnify the acceptor against the consequences of an acceptance made for his accommodation. So also it has been ruled at *nisi prius*, that in an action by the indorsee against an accommodation indorser of a bill, a witness who was indebted

**Accommodation indorser.**

(1) 4 Taunt. 463. *Hardwicke v. Blanchard*, Gow. 113, S. P.



to the plaintiff, and for whose accommodation the defendant indorsed the bill as a security for the debt, is incompetent to defeat the plaintiff, for he is liable to indemnify the defendant against the costs of the action. (1)

So in an action on a bill of exchange against the drawer, where the question was, whether the bill, as the defendant maintained, had been delivered by one A. B. to the plaintiff, to be discounted, or whether it had been delivered in payment for goods bought by A. B. of the witness, Lord Chief Justice Gibbs held, that A. B. was not a competent witness for the defendant, to prove that the former was the case; for if the witness had received the bill merely to get it discounted, and instead of doing so had pledged it for his own debt, he would be liable for the costs of the action, as special damage resulting from his breach of duty. (2) And in a more recent case, where the action was brought by the indorsee of a bill against the drawer, and a question arose, whether the plaintiff had received the bill from the acceptor in discharge of a debt due from him, or whether, as the defendant alleged, the bill had been accepted for a debt due from the acceptor to the defendant, and had been delivered to the acceptor that he might get it discounted, which acceptor had delivered the bill to the plaintiff on condition that the latter would get cash for it, but this the plaintiff had neglected to do, it was decided, that the acceptor could not be examined as to these facts on the part of the defendant; for although he was uninterested as to the amount of the bill itself (being liable on both sides), yet he was interested further as to the costs, against which he would have to indemnify the defendant, if the plaintiff got a verdict. (3) In the latter of these cases the witness was a party to the bill, and in the former he was not a party, and in neither of them were the circumstances exactly the same as in the before-mentioned cases of accommodation bills; but the principle upon which the

Agent employed to discount bill.

(1) *Bottomley v. Wilson*, 3 Stark. 148. In these cases there is a liability on both sides, but the liability on the part of the defendant preponderates. The competency of the witness will be restored by bankruptcy and certificate. *Ashton*

*v. Longes*, Mo. & Ma. N. P. C. 127. *Bassett v. Dodgin*, 9 Bing. 653.

(2) *Harman v. Lasbrey*, Holt, N. P. C. 390.

(3) *Edmonds v. Lowe*, 8 B. & C. 407.

witness was rejected, appears to be the same in all these cases ; *vis.* a liability to indemnify the defendant against the costs of an action, to which he had been subjected through the act or default of the witness.

Witness to  
prove payment  
to himself.  
When compe-  
tent for defend-  
ant.

*Larbalestier*  
*v. Clark.*

To this principle may be referred the late case of *Larbalestier v. Clark*, (1) where the defence, set up to an action for goods sold and delivered, was, that a third person had bought the goods of the plaintiff and sold them to the defendant on his own account, and had been paid for them by the defendant, and such person was tendered as a witness to prove these facts on the defendant's behalf. The Court of King's Bench thought, that under the particular circumstances of the case the witness was competent, as it did not appear that he had acted in the transaction in such a manner as to render himself liable to the defendant for the costs of the action, in case the plaintiff obtained a verdict ; but they were of opinion, that if the witness had appeared to have acted fraudulently in the matter, so as to incur this liability to costs, he would not have been competent. And Mr. Justice Littledale in giving judgment says, "it is now well established, that a person who has received money due from a defendant to a plaintiff, is not a competent witness for the defendant, to prove that he received the money as agent of the plaintiff, or in his own right, if his conduct has been such that he would be liable, in the event of a verdict for the plaintiff, to pay the defendant, not only the money received, but also the costs of that action in which the plaintiff should recover ; since in such a case he has an interest in defeating the action." The learned Judge added, that he regretted that such a rule had been established, because in many cases, it was extremely difficult to ascertain whether a party so situated would be liable to costs. And Mr. Justice Taunton observed, in the same case, that he had understood the rule of evidence as stated by Mr. Justice Littledale to be well established ever since the case of *Jones v. Brooke*. (2)

Cases on in-  
competency  
from costs,  
prior to *Jones*  
*v. Brooke*.

In some cases which had occurred prior to the case of *Jones v. Brooke*, it appears to have been considered, that where the witness was liable on both sides, his competency was not af-

(1) 1 Barn. & Ad. 899.

(2) *Ib.* 903.

fected by the circumstance of a greater liability to the defendant in respect of the costs of the action; (1) but the contrary appears to be now fully established by the authorities cited in the text; and we have already seen, that on this very ground of a liability to costs, a co-obligor of a bond, who was the principal debtor, was considered incompetent, in an action on the bond against a surety, to give evidence on behalf of the defendant. In the case in which this point was decided, (2) Lord Ellenborough asked, why there should not be an interest in costs as well as on any other account? And the general rule, that a liability on the part of a witness either to pay, or contribute to the costs of a cause, will render him incompetent, appears to have been recognised in several other cases.

Thus, as we have seen, the parties to the suit, who have no beneficial interest, are incompetent, upon the ground of a liability to costs. (3) In an action by an infant plaintiff, his *prochein ami* and guardian are not competent witnesses for him, on the ground of a similar liability. (4) So in most actions upon contracts, a co-contractor is incompetent to give evidence for the defendant, being interested to defeat the action, and thereby to avoid the liability of contribution to the costs. (5)

Other cases of liability to costs.

But in a recent case on this subject, where the action was in tort, being for a libel against a person who was secretary to a society, the members of which had agreed to contribute towards all law expenses, Lord Tenterden appears to have considered, that a member of the society was competent for the defendant without a release, on the ground that a contract between parties, for bearing each other harmless in doing wrong, was void, and consequently, that there was no legal liability to affect the witness. But his Lordship observed, that if the witness would be liable for a share of the expenses in the event of a judgment passing against the defendant, he would be incompetent. (6)

Liability arising from illegal contract.

(1) *Ilderton v. Atkinson*, 7 T. R. 480. *Birt v. Kershaw*, 2 East, 450.

(2) *Townend v. Downing*, 14 East, 565, *supra*, p. 86.

(3) *Ante*.

(4) *James v. Hatfield*, 1 Stra. 548. *Hopkins v. Neal*, 2 Stra.

1026. *Gilb. Evid.* 107. *Head v. Head*, 3 Atk. 511, 547.

(5) See cases cited *ante*, p. 85, and see *French v. Backhouse*, 4 Burr. 2727.

(6) *Humphrey v. Miller*, 4 Car. & P. 7-12.

Effect of the  
stat. 3 & 4  
W. 4, in cases  
of interest from  
a liability over.

It now only remains to notice the cases, upon the subject of incompetency arising from a liability over to one of the parties to the suit, which have occurred since the statute 3 & 4 W. 4, c. 42, came into operation; that it may be seen, what effect the provisions of this statute have had on this numerous and rather difficult class of cases. Before we enter on the consideration of these cases, it will be convenient to advert to the precise language of the statute.

Section 26.

The 26th section of the act is as follows: "And in order to render the rejection of witnesses on the ground of interest less frequent, be it further enacted, That if any witness shall be objected to as incompetent, on the ground that the verdict or judgment in the action on which it shall be proposed to examine him, would be admissible in evidence for or against him, such witness shall, nevertheless, be examined, but in that case, a verdict or judgment in that action, in favour of the party in whose behalf he shall have been examined, shall not be admissible in evidence for him, or any one claiming under him, nor shall a verdict or judgment against the party on whose behalf he shall have been examined, be admissible in evidence against him or any one claiming under him."

Section 27.

By the 27th section, it is further enacted, "That the name of every witness objected to as incompetent, on the ground that such verdict or judgment would be admissible in evidence for or against him, shall, at the trial, be indorsed on the record or document on which the trial shall be had, together with the name of the party on whose behalf he was examined, by some officer of the Court, at the request of either party, and shall be afterwards entered on the record of the judgment; and such indorsement or entry shall be sufficient evidence, that such witness was examined, in any subsequent proceeding, in which the verdict or judgment shall be offered in evidence."

As the practice under this recent statute is not completely settled, it is proposed to state the several decisions in order as they have occurred, and afterwards to advert to the different

views which have been taken, as to the intentions of the legislature.

In one of the earliest cases since the passing of the statute, it is said to have been ruled by Lord Lyndhurst, that in an action on a guarantee, the party primarily liable, who was tendered as a witness for the defendant, and objected to on the ground of his being liable to indemnify the defendant against the costs, was not rendered competent by the provisions of the statute. (1) So also, in an action on a bill of exchange, accepted by the defendant for the accommodation of the drawer, it is said to have been ruled by the same learned Judge, that the witness was not rendered competent by the statute, which he thought was not intended to apply to cases of this nature. (2) And in a subsequent case, in an action for injuring the plaintiff's house by improperly digging a cellar, whereby the plaintiff's wall sunk, the person employed to dig the cellar by the defendant was tendered as a witness on his behalf, but Mr. Justice Patteson is reported to have been of opinion, that the witness was not rendered competent by the statute, and that the statute was not intended to apply to such cases. (3) The same learned Judge also seems to have ruled, that a carrier's servant was incompetent to disprove negligence in an action against his master, without a release. (4)

Decisions—  
Witnesses  
liable over to  
the defendant  
rejected.

In these cases, the witness was tendered on the part of the *defendant*; and we have seen, that it was only when called by the defendant, that the witness, (before the passing of the statute,) was objected to, on the ground of the admissibility of the verdict as evidence against him in a subsequent action. For, in all cases, where witnesses, called by the plaintiff, have been rejected in consequence of a liability over to him, the rejection has always proceeded on the ground of a direct interest in the event of the suit. (5) In a late case before Lord Denman, (6)

Witnesses  
liable over to  
the plaintiff  
rejected.

(1) *Braithwait v. Coleman*, Hertf. Spring Ass. 1834. 2 Har. Ind. 1047.

(2) *Burgess v. Cuthill*, 1 Mood. & Rob. 315. 6 Car. & P. 282.

(3) *Mitchell v. Hunt*, 6 Car. & P. 351.

(4) *Harrington v. Caswell*, 6 Car. & P. 352.

(5) See *Morish v. Foote*, *supra*, p. 100, and other cases.

(6) *Harding v. Cobley*, 6 Car. & P. 664.

where, in an action for an injury alleged to have been done to the plaintiff's horse by the negligent driving of the defendant's servant, the plaintiff called as a witness on his part a servant, who had the care of the horse at the time of the accident; the servant was objected to as incompetent without a release; and Lord Denman said, that it was so decided in the case of *Wake v. Lock*, (1) which he had considered a good deal. And upon the statute 3 & 4 W. 4, c. 42, being relied on as restoring the witnesses' competency, Lord Denman appears to have considered, that the statute did not apply, since it only rendered competent those persons for or against whom the verdict or judgment would be evidence; but if the witness should state what he was expected to state, and should be believed, there never could be any action against him.

In a still later case, a witness called for the plaintiff was rejected by the same learned judge, on the same ground of an immediate interest in the event of the suit, arising from a liability to the plaintiff, which would be removed by a verdict in the plaintiff's favour. In this case the action was for use and occupation, and in order to show that the defendant had occupied the premises, a witness was called, who stated that he had taken the premises of the plaintiff, and had not been released from his tenancy, and upon his being asked whether he had not given up the premises to the defendant, it was objected, that he was interested in fixing the defendant, and upon the statute being referred to in support of the admissibility of the witness, Lord Denman ruled, that the witness was not competent, on the ground that he had a direct interest in the event of the suit; for if the plaintiff succeeded in getting the amount he claimed from the defendant, that would put an end to his claim for rent, for the time for which he sought to recover it in the action. (2)

Immediate interest not within the statute.

In all these cases it appears to have been considered, that witnesses, objectionable on the ground of a liability

(1) *Supra*, p. 101. 5 Car. & P. 454.

(2) *Hodson v. Marshall*, 7 Car. & P. 16.

over to either of the parties to the suit, which liability would be removed by a favourable verdict, had an immediate interest in the event of the suit, and that such an interest was not removed or affected by the provisions of the statute. But in a very recent case before Mr. Baron Parke, that learned Judge ruled, that the drawer of a bill was a competent witness for the defendant, in an action against a person who had accepted it for such drawer's accommodation. It was stated at the trial, that Lord Lyndhurst had ruled, that such a witness was not rendered competent by the 3 & 4 W. 4 c. 42; (2) but Mr. Baron Parke said, he thought, that by indorsing the witness's name on the postea, according to the 27th section, the witness would be rendered competent, for he could only be made liable to the costs of that action by means of the verdict or judgment, which in consequence of the indorsement of his name could not be used against him; and to the amount of the bill he was liable at all events. The witness's evidence was accordingly received, and the defendant obtained a verdict. (3)

Late case before Park, B. Drawer of accommodation bill, held competent.

In cases like that which is the subject of the last-mentioned decision, the liability to costs formed the only ground upon which the witness was held to be incompetent before the passing of the statute, (4) and this liability appears to be effectually removed in the manner pointed out by Mr. Baron Parke. By the act of calling the drawer as a witness, the defendant precludes himself from using the verdict against him in a subsequent action; and as the costs can only be recovered by means of the record, the result is precisely the same, as if the defendant had released the witness from the costs. It might, however, perhaps be urged against the reception of the witness, that according to many authorities, an interest arising from a liability over to one of the parties to the suit, is an immediate interest in the event of

Observations on *Faith v. McIntyre*.

(1) *Faith v. McIntyre*, 7 Car. & P. 44.

(2) Probably, the case of *Burgess v. Cuthell*, *supra*, 109. The name of the case was not mentioned.

(3) A rule nisi for a new trial was afterwards obtained, but not

as it seems on the ground of the improper admission of the witness, and the rule was afterwards discharged, 7 Car. & P. 48, n.

(4) See *Jones v. Brooke*, *supra*, 104, and the subsequent cases there cited.

the suit: and that the language of the statute only applies to cases "in which any witness shall be objected to as incompetent, on the ground that the verdict or judgment in the action in which it is proposed to examine him would be admissible in evidence for or against him." If, therefore, the witness was objected to, not on the ground of this indirect interest in the record referred to in the statute, but upon the other ground of a direct interest in the event of the suit, it might be urged, that the case did not fall within the statute, even although it were true that the interest might be removed in the manner which the statute prescribes.

Distinction between witnesses liable over to the plaintiff, and to the defendant.

Some difficulties arise from the application of the principle of the ruling, in *Faith v. McIntire*, to other cases of witnesses objected to on the ground of a liability over to the parties to the suit or either of them. The ground upon which the witness was admitted in that case was, as we have seen, that the liability over to the defendant could only be enforced by means of the record, and that the defendant, by calling the witness, precluded himself from using the record against him. That principle, it seems, would apply to all cases of liability over either for damages or costs in the action, when the witness is called for the *defendant*; and consequently, in all cases where servants, agents, and other parties liable over, are called on the defendant's part, they would be competent without a release. But when such witnesses are called on the part of the *plaintiff*, the reasoning would not apply, for if the plaintiff should fail in the action, he might enforce his remedy over against such witnesses without producing the record, which indeed would not be admissible evidence against the witness for any purpose; and, therefore, all such witnesses would be incompetent for the plaintiff without a release.

No doubt or difficulty can arise with regard to the application of the statute to that class of cases, in which witnesses were formerly rejected as incompetent, not from direct interest in the event of the suit, or from liability over to either of the parties, consequent upon the event of the suit, but solely on the ground that a verdict for or against some



general right or custom, would be admissible in evidence for or against the witness, as evidence of the fact decided in the first action. In all such cases, the competency of the witness would be restored by the statute, and the question of his competency would in no manner be affected by the accident of his being called for the plaintiff, or for the defendant. There is a material distinction between this class of cases, and the cases of an interest arising from a liability over—inasmuch as here the witness has no interest either in regard to damages or costs, and, whichever way the cause may be determined, he can neither gain nor lose by it ; but, in the latter class of cases, the witness is actually interested in the determination of the very question which forms the subject of the action, and a favorable verdict at once relieves him from a liability over in respect of the identical question at issue between the plaintiff and the defendant. It is quite clear that the statute was meant to embrace the former class of cases ; but from the contradictory opinions expressed with regard to the latter class, considerable doubts appear to have been entertained, whether the statute was intended to apply to them. It may be remarked, that the interest arising from a liability over could always be removed by means of a release, whereas the other kind of interest, namely, that arising from the right of using the record as evidence, could not be removed ; and as the latter species of interest often occasioned the exclusion of an extensive class of persons, who were most likely to have information upon the question at issue, these might appear to be stronger reasons for the interference of the legislature in this case, than with regard to an interest arising from a liability over. (1)

(1) Although doubts have been expressed on this subject, it is probable that the more liberal construction will ultimately prevail. In two recent cases, Mr. Baron Parke, again ruled, that the statute applied to the case of witnesses liable over to the defendants, and, upon the contradictory decisions being referred to, he observed, that he had always

ruled differently, and that his ruling had never been questioned, and that the statute would be frittered away by a contrary construction: *Pickles v. Hollings*, 1 Mood. & Rob. 468. *Creevey v. Bowman*, 1 Mood. & Rob. 496. The statute, it seems, does not apply to the case of an issue directed by a Court of Equity: *Stewart v. Barnes*, 1 Mood. & Rob. 472.

## CHAPTER VIII.

## WHAT IS NOT SUCH AN INTEREST AS WILL DISQUALIFY.

**H**AVING endeavoured, in the preceding chapter, to explain the general rules upon the subject of incompetency from interest, and to collect and arrange the various cases in which witnesses are liable to be rejected from this cause, it is now proposed, in further illustration of the subject, to notice a variety of cases in which witnesses may be so connected with the questions at issue in the particular action, as to give rise to the suspicion that they are interested in the event, but in which there is no legal interest capable of producing incompetency.

Wishes, or  
expected  
benefit.

It is not an objection to the competency of a witness that he has wishes or a strong bias on the subject matter of the suit, or that he hopes to obtain some benefit from the result of the trial. Such circumstances may influence his mind and affect his credibility, they are therefore always open to observation, and ought to be carefully weighed by the jury, who are to determine what dependence they can place on his testimony; but it is clear, from what has been seen in the preceding chapter, that they are insufficient to render him incompetent.

Witness in  
same situation  
in civil actions.

A witness who stands in the same situation as the party for whom he is called to give evidence, is under a strong bias, and may have strong wishes on the subject; but unless he will gain or lose by the event of the particular suit, he will not be disqualified. Thus, if there are two actions brought against two persons for the same assault, in the action against one the other may be a witness, because he is not interested in the event. (1)

Co-trespassers.

(1) By Ashurst, J., 1 T. R. 301. By Abbott, C. J., 5 B. & C. 387.

So also, in the case of *Bent v. Baker*, (1) which, as we have seen in the preceding chapter, is a leading authority on the rule of incompetency from interest, as that rule existed before the statute 3 & 4 W. 4, c. 42, it was decided, after much argument, that in an action against an underwriter on a policy of insurance, another underwriter was a competent witness for the defendant, on the ground that he neither gained nor lost directly by the event of the particular suit, nor could the verdict therein be evidence for or against him in any subsequent suit. So also it appears, that in an action in which a question arises concerning the validity of a deed, the attorney who prepared the deed is a competent witness to prove that the deed is valid, notwithstanding that there is another action pending against him, in which he must fail, if the deed be invalid. (2)

Underwriter to same policy.

The same rule prevails in criminal proceedings; as, when several persons are separately indicted for perjury in swearing to the same fact, either of them may, before conviction, be a witness for the others. (3) So in *Rudd's* case, a woman, whose husband had been before convicted, was admitted to give evidence against the prisoner, though she expected, in case of his conviction, that her husband would receive a pardon. (4) In treating of the evidence of accomplices, it has been seen, that persons admitting their participation of crime with the prisoner at the bar, but not indicted with him, are competent to give evidence for him as well as for the Crown; and though separately indicted for the same offence, they are not incompetent, until rendered infamous by actual conviction. (5) Where separate informations of *quo warranto* are brought against several members of a corporation, on the trial of one of the informations the other parties are competent witnesses on behalf of the defendant. (6)

Witness in same situation in criminal proceedings.

Accomplices.

(1) 3 T. R. 27.

(2) *Hudson v. Revett*, 5 Bing. 368.

(3) *Bath v. Montague*, cit. *Fortes. Rep.* 247. *Gunstone v. Downes*, 2 Roll. Ab. 685, Art. 3. S. C.

cited 2 H. P. C. 280, and in *R. v. Gray*, 2 Selw. N. P. 148.

(4) 1 Leach Cr. Ca. 151.

(5) *Supra*, Ch. 3.

(6) *R. v. Gray*, 2 Selw. N. P. 1148, (6th edit.)

Influence of  
verdict.

A witness, who has no actual interest in the event of a suit, is not incompetent on the ground that the verdict may afterwards come to the knowledge of a jury in an action brought by the witness himself, and so have an influence on their decision, though not adduced as evidence before them. This subject has been touched upon in treating of the competency of the prosecutor, or party grieved, to give evidence upon indictments. (1) In the case of the *King v. Whiting*, (2) indeed Lord Holt, on an indictment for a cheat, in obtaining a person's subscription to a note of 100*l.* instead of 5*l.*, rejected the evidence of the maker of the note, on the ground that the verdict would certainly be heard of in an action on the note, and would influence the jury; and this decision was followed by Lord Hardwicke, in a case before him. (3) But in a subsequent case, Lord Hardwicke reviewed his opinion and that of Lord Holt, and decided that the objection went only to the credit, and not to the competency of the witness; and with respect to the possibility that the jury might hear of the verdict, he said that sitting as a Judge he could only hear of it judicially. (4) This doctrine was fully confirmed in the subsequent case of the *King v. Boston*, (5) where it was held that a witness was competent to give evidence for the prosecution upon an indictment for perjury, although a civil action was pending between himself and the party indicted, in which the same question arose as upon the indictment, and which was coming on for trial at the same assizes.

Borrower in  
case of usury.

So in an action for penalties, under the statute of usury, against the lender of the money, the borrower is a competent witness for the plaintiff; and whether he has or has not repaid the money lent, does not appear to make any essential difference, so far as his competency is affected, for in neither case does he gain any thing immediately by the event of the suit: nor could any objection be made to his competency on the ground of an indirect interest in the record, even before the passing of the statute

(1) *Ante*, Ch. 6, p. 64.

(2) 1 Salk. 283.

(3) *R. v. Nunez*, 2 Stra. 1043.

(4) *Rep. temp. Hard.* 572.

(5) 4 East, 572. *Supra*, p. 64.

3 & 4 W. 4, c. 42, for the verdict in the action for penalties could not be used as evidence in a subsequent action for the debt. (1)

In the preceding chapter we have seen, that a legal liability to be sued in respect of the matters in issue in a particular action, in the event of an unfavourable verdict, will in many cases exclude witnesses from giving evidence. But the bare possibility of an action being brought against a witness is no objection to his competency. Thus, it has been decided, that in an action against an administrator, one of the bond securities for the defendant's due administration of the intestate's effects is a competent witness, on the part of the defendant, to prove a tender, and the Court said in this case, that if a creditor of the administrator had been offered as a witness (which was a stronger case), there could have been no objection to his evidence being received. Mr. J. Buller added, "In order to shew a witness interested, it is necessary to prove that he must derive a *certain* benefit from the determination of the cause one way or the other. In this case, supposing there were no assets, though the defendant would be answerable for the costs, he would not be liable on his bond to the Ecclesiastical Court. He is only bound to distribute the intestate's effects, and it does not appear in this case how they have been applied." Upon the same principle, a witness is competent to prove a codicil, made subsequently to a second will, and reviving a former will, though he has acted under the first will, and might possibly be subjected to actions brought against him as executor *de son tort*, if it should be set aside. (2)

Possibility of action.—Uncertain interest.

It has been before stated, that in actions by or against executors or administrators, a residuary legatee, or person entitled as next of kin to a distributive share of the estate, is incompetent to increase the fund in which he is so interested, for he has a direct and certain interest in giving evidence to this effect. But the principle of these cases does not apply to legatees of speci-

Actions by executor.—Specific legatees.

(1) *Abrahams v. Bunn*, 4 Bar. 2251. *Smith v. Prager*, 7 T. R. 60. See *Masters v. Drayton*, 2 T. R. 496.

(2) *Baillie v. Wilson*, cit. 4 Bur. 2254, and see *Goodtitle v. Wilford*, 1 Doug. 140.

fic sums or chattels, for it is a matter altogether uncertain, whether they will or will not derive any benefit from a favourable termination of the suit. Thus, in an action by an executor to recover a debt due to the estate, it was ruled by Lord Tenterden, that a paid legatee was a competent witness for the plaintiff to increase the estate. (1) It was objected to his competency, that he would be obliged to refund, in case the estate should prove deficient, but his Lordship observed, that there was nothing to shew that the other funds were insufficient, and although the debt sought to be recovered in the action had not been paid, it was not to be assumed that there was not some other estate sufficient. (2) In this case, the legatee had been paid his legacy; but it seems to make no difference with regard to the competency of the witness, whether he has or has not been paid. (3) In a very recent case, it was decided by the Court of King's Bench, in an action against executors for a debt of the testator, that a person entitled to an annuity under the will was a competent witness on the part of the defendants. (4)

Annuitant  
under a Will.

Creditor of  
estate.

Upon the same principle, on which witnesses are not disqualified in the above mentioned cases, that is to say, because the interest is altogether uncertain, a creditor of the estate is a competent witness for an executor or administrator to increase the fund. In the case of *Paull v. Brown*, (5) it was ruled, in an action by an executor to recover a debt due to the estate, that a creditor was a competent witness for the plaintiff; and Macdonald, C. B., said, the creditor may give evidence for his debtor in his life-time, and is equally competent to give evidence for his executor after his death.

In a case subsequent to that last mentioned (6) it was ruled by

(1) *Clarke v. Gannon*, Ry. & Mo. N. P. C. 31.

(2) Ry. & Mo. 32.

(3) In *Johnson v. Baker*, 2 Car. & P. 207, an unpaid legatee was admitted in an action against the executor, but it appears that in that case the demand was considered

as one which was not recoverable out of the estate. See 5 B. & Ad. 370, by Patteson, J.

(4) *Nowell v. Davies*, 5 B. & Ad. 368.

(5) 6 Esp. 34.

(6) *Craig v. Cundell*, 1 Campb. 381.

Lord Ellenborough, that a creditor was not competent for the executor, if it appeared that the estate was insolvent, although it was urged that the interest must necessarily be quite uncertain, for an executor was not bound to distribute equally, but might give a preference to any creditor whom he thought fit to select. But the opinion of Lord Ellenborough on this point was questioned by Parke, J., in a late case before him at nisi prius, (1) in which he ruled that an unsatisfied creditor was a competent witness for an administrator upon a plea of *plene administravit*; and the authority of the case of *Paull v. Brown* was fully upheld by the Court of King's Bench in the case of *Nowell v. Davis*. (2)

It will be observed, that there is a material difference between these cases and the class of cases collected in the preceding chapter, which decide that the creditor of a bankrupt or insolvent is incompetent to increase the fund; for in the latter cases the assignee is under an obligation to distribute equally amongst all the creditors, to whom, therefore, the fund *primâ facie* belongs, and whatever is either added to, or taken from the fund, must naturally be presumed to be for the advantage or disadvantage of the creditors. But even in these cases, if the creditor has assigned his debt, though only by parol, his competency will be restored, for he is then a mere naked trustee, having no beneficial interest whatever. (3) It may, indeed, be laid down as a general rule, that mere trustees and executors in trust are not rendered incompetent by an interest, which is, as far as they are concerned, only nominal. (4) If a trustee has a beneficial interest, or is exposed to any immediate liability in respect of costs, that may be another ground of objection, but without such interest or liability, trustees and executors are competent witnesses. (5) In an action by a bankrupt against his assignee, the official assignee is a competent witness to sus-

Creditors of  
bankrupt, &c.  
assigning.

Mere trustees,  
&c. competent.

(1) *Davies v. Davies*, Mo. & Ma. 345.

(2) See per Lord Denman, C. J., 5 B. & Ad. 371. In neither of the last two cases does it appear that any evidence was given with respect to the solvency or insolvency of the estate, but it appears difficult to understand how this can alter the question with respect to the

competency of a creditor. See per Parke, J., 5 B. & Ad. 370.

(3) *Heath v. Hall*, 4 Taunt. 326. *Granger v. Furlong*, Bl. Rep. 1273.

(4) See 1 Mod. Rep. 107. *Goss v. Tracy*, 1 P. Wms. 287. *Gilb. Evid.* 123. 1 Bl. Rep. 366.

(5) *Goodtitle v. Welford*, 1 Dong. 140. *Bettison v. Bromley*, 12 East, 250. Per Mansfield, C. J.,

tain the bankruptcy, for his allowance is uncertain, and depends upon the discretion of the commissioner. (1)

Other exam-  
ples.

Actions res-  
pecting real  
property.

In an action on the case by a reversioner, for an injury done to his inheritance by a stranger, the tenant in possession is a competent witness to prove the injury. (2) In an action between a vendor and the purchaser of lands, a former vendor, who has sold without warranty, is competent to prove the title. (3) An executor is also competent to prove the sanity of the testator in an action of ejectment concerning his real property. (4) In none of these cases does the witness gain or lose directly by the event of the suit, and as the verdict could not have been evidence for or against him in any subsequent action, he was not incompetent upon this ground even before the latter species of disability was removed by the late statute. Upon similar grounds it has been decided, that in an action for mismanagement of a farm the sub-lessee of the defendant is competent to prove its proper cultivation. (5) And in a recent case, where in an action of trespass, the defendant pleaded *liberum tenementum* in a third person, and justified under him, and it appeared at the trial that the plaintiff also claimed under a conveyance from the same person, who had subsequently conveyed the land without warranty to the defendant, and after that had taken a mortgage of the lands from the defendant, it was decided, that such person was a competent witness for the defendant, for he had no legal interest in the event; the objection, as to his coming to impeach a former conveyance to the plaintiff, would not affect his competency but only his credit. (6)

Policy of Insu-  
rance. Cap-  
tain.

In an action on a policy of insurance on goods, where the only question was concerning the original destination of the ship, the captain has been considered competent to give evidence for the plaintiff respecting that fact, though he was a part owner of the ship, and as such, liable to the owners of the goods, in case

4 Taunt. 328. *Phipps v. Pitcher*, 6 Taunt. 220. See 1 Ball and Beatty's Rep. 100, 414, and cases there cited as to the rule in equity.

(1) *Giles v. Smith*, 1 Mood. & Rob. 443.

(2) *Doddington v. Hudson*, 1 Bing. 257.

(3) *Busby v. Greenalade*, 1 Stra 445.

(4) *Doe v. Teage*, 5 B. & C. 335.

(5) *Wishaw v. Barnes*, 1 Campb. N. P. C. 341. *Qs.* as to any liability over in this case.

(6) *Simpson v. Pickering*, 5 Tyrw. 143.



the ship had unnecessarily deviated from the voyage ; but if the question had turned on a deviation, he could not have been examined. (1)

So in an action of trover by assignees of a bankrupt, for goods in the possession of the defendant, who had obtained them under a sale from the bankrupt, (the validity of which transaction the plaintiffs disputed,) a third person was held competent for the defendant, to prove that the goods belonged neither to the plaintiffs nor to the defendant, but to himself. (2) It has also been held, that in an action on a contract, in order to recover damages for the loss of some copies of a work, which loss was alleged to have been occasioned through a breach of the defendant's contract to insure them from fire, a witness who had purchased a number of the copies from the plaintiff, but was not privy to the contract with the defendant, was competent on the part of the plaintiff to prove the contract. (3) In an action for infringing a patent, a purchaser of a license to use the patent is a competent witness for the plaintiff. (4) And in an action for falsely representing the circumstances of a person who was insolvent, that person is competent on the plaintiff's part to prove his insolvency. (5)

Assignees of  
bankrupt.

Action on con-  
tract.

Other cases.

A witness will not be disqualified, because, through a mistaken view, he may believe himself to have an interest, which he does not possess. It is true, if a witness believes himself to be interested, the impression on his mind, and his bias in favour of the party calling him, may be as strong, as if he were legally incompetent. But the difference is, that in the one case the inquiry is more simple and more easily defined ; in the other it would be complicated, vague, and uncertain. For

Witness be-  
lieving himself  
interested.

(1) *De Symonds v. De la Cour*, 2 N. R. 374.

(2) *Ward v. Wilkinson*, 4 B. & C. 410, and see *Nix v. Cutting*, *supra*, p. 103, the same doctrine was applied in ejectment for tithes, *Doe d. Bath v. Clarke*, 3 Bing. N. C. 429.

(3) *Mawman v. Gillett*, 2 Taunt. 325, n. This case has been sometimes cited as deciding, that a dormant partner of the plaintiff may be a witness for him against the

defendant, where there has been no privity of communication relative to the contract on his part, and the language of Mansfield, C. J., appears to warrant the inference ; but it would seem that this proposition cannot be supported. See *Skinner v. Stocks*, 4 B. & A. 437.

(4) *Derosne v. Fairlie*, 1 Mood. & Rob. 457.

(5) *Smith v. Harris*, 2 Stark. 2 P. C. 47.

the purpose of determining whether a witness was incompetent, on the ground of believing himself to be interested, it might be necessary to examine him on a great variety of points, which after all would be more proper for the consideration of a jury; as for example, on the nature of the benefit he expects, the reasons for his expecting it, or the impression which such an expectation might have produced on his mind. Such an inquiry would in all cases be extremely indefinite, and would lead to great inconvenience. The course, therefore, uniformly taken, is to inquire, not into the state of the witness's belief on the subject, but to ascertain whether or not, as a matter of fact, he has any existing legal interest in the event of the suit.

Honorary  
obligation.

Thus it has been held, that a witness who believes himself under an obligation of honour to indemnify the bail in an action, is not incompetent, unless he has in fact entered into an engagement to that effect.<sup>(1)</sup> Such an obligation is in general of a nature so uncertain and variable, that it cannot safely be recognised in courts of justice as a motive of conduct. Besides, where the sense of honour is so strong and binding as to influence a witness against his interest, it must be unnecessary to reject the witness; as the same principle, which would induce him to pay the costs, would oblige him, in giving his evidence, to speak only the truth; and, in cases where the sense of honour is less firm and imperative, the ground of the objection fails, since the witness is not bound in point of law, and does not feel himself absolutely bound in point of morals. But, independently of this reasoning, another more general answer is, that the ends of justice are most effectually attained by a full and complete investigation of the subject in dispute; and, unless the objection to the witness is founded on a strictly legal interest, he will be admitted to give evidence. In the case supposed, of a witness who says he thinks himself bound in honour to pay the costs, it might be injurious to the party who calls him, to be deprived of his testimony on account of such a fancied obligation; more especially, as it is an obligation which may easily be pretended by the witness,

(1) *Pederson v. Stoffes*, 1 Campb. 145, S. P., said to have been ruled *contra*, in an old case, by Parker,

C. J.; see *Fotheringham v. Greenwood*, 1 Str. 129.

but which it is scarcely possible for the court justly to appreciate, and which, from the nature of the case, the party cannot release nor enforce against the witness; on the other hand, his testimony may not deserve all the credit due to a witness free from bias, and it ought therefore to be strictly examined and sifted. The witness, then, is to be heard, but his evidence is open to observation. (1)

Cases not unfrequently arise, in which a witness, who has an interest inclining him to one of the parties to a suit, has also an interest inclining him to the opposite party. These cases have been adverted to in the last chapter, where it has been shewn, that if the interest on one side be greater than that on the other, the party will be an incompetent witness for the side on which his interest preponderates; but where the liability or interest, on the side on which he is called, is counterbalanced or outweighed by an equal, or greater liability or interest on the other side, he will be competent.

Interest on  
both sides.

Thus, in an action of assumpsit for money paid to the use of the defendants, who were ship-owners, Lord Kenyon admitted the captain as a witness for the plaintiff, to prove that he had received the money for the defendants' use; for he stood indifferent between the parties, and, which ever way the verdict might go, he was equally answerable. (2) So, in an action of covenant for rent, where the point in issue was, whether A. B., whose title both the plaintiff and defendant admitted, had demised the premises first to the plaintiff or to another person, A. B. was considered a competent witness for the defendant to prove the fact, the Court saying that it was a matter of indifference to the witness, whether he had one person or the other for

(1) There are several dicta in support of the position, that a witness is not competent, if he believes himself interested, whether he is or is not interested in strictness of law. By Pratt, C. J., in *Fotheringham v. Greenwood*, 1 Str. 129, cited and approved by Lord Loughborough, C. J., and by Gould, J., in *Trelawney v. Thomas*, 1 H. Bl. 307. S. P. by *Perry*, B.,

in *Newland's case*, 1 Leach, Cr. C. 353. And see a case tried before Lord Mansfield, cited by counsel in *Rudd's case*, Leach, Cr. C. 154. See also the case of the *Amitié*, Villeneuve, 5 Robinson, Adm. Rep. 344, n.; and the case of the *Galen*, 2 Dodson, Adm. Rep. 20.

(2) *Evans v. Williams*, 7 T. R. 481, n. (c.) *Rocher v. Busher*, 1 Stark. N. P. C. 27.

his tenant, and though he might feel inclined to prefer one tenant to another, this objection would go to his credit only, and not to his competency, because the verdict could not be given in evidence in any action to be brought by or against him. (1)

Joint con-  
tractors.

Parties.

Several cases, relative to the competency of witnesses equally interested on either side, have arisen with regard to co-contractors and partners. In an action on a bond against one of several obligors, another of the obligors is competent for the plaintiff to prove the execution of the bond. (2) And in an action on a promissory note against one of several joint makers, a maker of the note who is not sued is competent to prove the defendant's signature. (3) In these cases it has been said, if the plaintiff recover, the witness will be liable to the defendant for contribution; if the plaintiff fail, he may resort to the witness for the whole, and in that case the witness will be entitled to contribution for the defendant; so that in either point of view the witness stands indifferent between the parties. So also in assumpsit for goods sold and delivered, a witness, who admitted himself to be a partner of the defendant, was held competent on the part of the plaintiff to fix the defendant's liability. (4) And in an action charging the defendant as a partner in a trading company, a witness, proved to be himself a shareholder, was held competent on the part of the plaintiff to prove that the defendant was a partner. (5) Upon the same principle, in an action of contract in which the defendant pleads the non-joinder of a partner a co-contractor in abatement, the alleged joint contractor is a competent witness for the plaintiff to negative the plea: (6) for it is indifferent to the witness, which way the verdict goes. Indeed, if he be in fact a partner, the verdict in favour of the plaintiff would rather be prejudicial to him, for he would then be liable to contribution, increased by the amount of the costs. In the one way, therefore, the verdict would be indifferent, in the other prejudicial. (7)

(1) *Bell v. Harwood*, 3 T. R. 308.

(2) *Lockett v. Graham*, 1 Stra. 35.

(3) *York v. Blott*, 5 M. & S. 71.

(4) *Blackett v. Weir*, 5 B. & C. 385.

(5) *Hall v. Curzon*, 9 B. & C.

646.

(6) *Hudson v. Robinson*, 4 M. & S. 476. *Coshan v. Goldway*, 2 Stark. N. P. C. 414.

(7) By Lord Ellenborough, 4 M. & S. 479. We have seen in the last chapter, that on account of

From the case of *Ridley v. Taylor*, (1) it appears to have been considered by the court of King's Bench, that in an action by the indorsee against the acceptor of a bill drawn in the name of a firm, a member of the firm was a competent witness for the defendant, to prove that the bill had been drawn by one of the partners in fraud of the rest, and indorsed by him to the plaintiff for a separate debt.

Partner of  
drawer of bill.

In actions on negotiable securities many instances arise in which parties to the instrument are competent witnesses, by reason of an equal liability on either side. It has already been mentioned, that in an action against one of several makers of a note, a joint maker not sued is a competent witness for the plaintiff. And in an action against the acceptor of a bill, the drawer is a competent witness for either party. (2) Thus, he has been admitted for the plaintiff, to prove the defendant's hand-writing to the bill; (3) and he has also been admitted for the defendant, to prove payment of the bill, (4) and also to impeach the plaintiff's right to recover, on the ground of an usurious consideration. (5) If, however, the bill has been accepted for the drawer's accommodation, the drawer is incompetent on behalf of the acceptor, (as we have seen in the preceding chapter), on the ground that he is not merely liable to the acceptor for the amount of the bill, but is also bound to indemnify him for the costs of the action; (6) in this case, however, the drawer will be rendered competent by bankruptcy and certificate. (7)

Actions on bills  
and notes.

Competency of  
joint maker of  
notes.

Drawer of a  
bill.

Accommoda-  
tion drawer in-  
competent for  
defendant.

In an action on a promissory note or bill by an indorsee, the indorser is in general a competent witness, either for the plaintiff

Competency of  
indorser.

the superior liability for costs, the witness has been held incompetent for the defendant.

(1) 13 East, 175.

(2) *Dickinson v. Prentice*, 4 Esp. N. P. C. 32.

(3) *Dickinson v. Prentice*, 4 Esp. N. P. C. 32.

(4) *Humphrey v. Moxon, Peake*, N. P. C. 52. See *Pool v. Bousfield*,

1 Campb. 55. *Le Sage v. Johnson, Forrest*, 23.

(5) *Rich v. Topping, Peake*, N. P. C. 224. *Brard v. Ackerman*, 5 Esp. 119.

(6) *Supra*, p. 106. *Jones v. Brooke*, 4 Taunt. 464.

(7) *Ashton v. Longes, Mo. & Ma. N. P. C. 127.*

or the defendant. He may be called by the plaintiff to prove his own indorsement, (1) and by the defendant to prove that the bill has been paid, (2) or that it is void on the ground of not being properly stamped, having been actually made in London, though dated in a foreign country. (3) In these cases there is no interest to disqualify the witness from giving evidence for the plaintiff, for although the circumstance of the plaintiff succeeding in the action may prevent him from suing the witness, it is not certain that it will have this effect; and whatever part of the bill or note the indorser is compelled to pay, he may recover again from the drawer or acceptor: the witness is also competent for the defendant, for if the plaintiff fail he is not prevented from suing the witness. (4)

Accommodation indorsee or drawer—competent for plaintiff.

If a bill has been drawn for the accommodation of the indorser, he is a competent witness for the plaintiff, to prove that the latter gave him value for the bill: (5) for the reason, upon which an accommodation drawer or indorser has been held incompetent for the defendant, namely, on the ground of a liability to costs, does not apply, when the witness is called on the part of the plaintiff. And in a very recent case, where a bill had been accepted for the accommodation of the drawer, who had misapplied the bill, and the acceptor brought trover to recover it from a third party, it was decided by the Court of Common Pleas, that the drawer was a competent witness for the plaintiff, on the ground that which ever way the verdict went, he would be liable to one or other of the parties, and therefore stood indifferent. It was argued in this case, that if the plaintiff failed, the witness would be liable to him for the costs, but the Court said there was no principle, upon which the witness could be held liable to the plaintiff for the costs of an action, which the latter was unable to support. (6)

(1) *Richardson v. Allen*, 2 Stark. N. P. C. 334.

(2) *Charrington v. Milner, Peake*, N. P. C. 6.

(3) *Jordaine v. Lashbrooke*, 7 T. R. 601.

(4) See Bayly on Bills, 5th edit. 536.

(5) *Shuttleworth v. Stephens*, 1 Campb. 408.

(6) *Fancourt v. Bull*, 1 Bing. N. C. 681.

It was held, in the case of *Buckland v. Tankard*, (1) that in an action by an indorsee against the acceptor, the indorser of a bill was incompetent for the defendant to prove that he indorsed the bill to the plaintiff, upon trust to enable him to obtain payment from the defendant on account of the witness himself, and not for any consideration, or with intent to convey any interest on the bill. The reason given for the rejection of the witness was, that if the plaintiff succeeded, the witness would be put to much greater difficulty in getting back his money than if the plaintiff were defeated; but the principle of the decision appears doubtful. We have seen, that in the case of *Edmonds v. Lowe*, (2) which was an action by an indorsee against the drawer of a bill, the acceptor was held incompetent for the defendant to prove that the plaintiff had received the bill from him upon condition that he should get it discounted, and that he had not done so; but this was upon the special ground, that under the circumstances of that case the acceptor would have been liable to indemnify the defendant against the costs, if the plaintiff obtained a verdict.

Case of *Buckland v. Tankard*.

*Edmonds v. Lowe*, acceptor, liable to indemnify.

In an action by the indorsee against the indorser of a promissory note, the maker is a competent witness for the plaintiff, for if the plaintiff succeeds the witness will be liable to the defendant, and if the defendant succeeds the witness will still be liable to the plaintiff: and his liability to the one cannot exceed his liability to the other. (3) And the maker is also, on the same ground, a competent witness for the defendant; as, to prove that the date of a note has been altered. (4) But it has been ruled, that in an action on a bill against the drawer, the acceptor is not competent for the defendant to establish a set-off, arising upon a bill accepted by the plaintiff and indorsed by the witness to the defendant, on the ground that the witness would be answerable to the drawer only to the amount recovered by the plaintiff. (5)

Maker of promissory note.

Acceptor of bill.

(1) 5 T.R. 578.

(2) 8 B. & C. 407. *Supra*, p. 105.

(3) *Venning v. Shuttleworth*, Bayly on Bills, 5th edit. 536.

(4) *Levy v. Essex*, Chit. Bills,

413, 7th edit.

(5) *Mainwaring v. Mytton*, 1 Stark. 83. In Bayly on Bills, 4th edit. 540, it is observed on this case, "that if the drawer be pro-

## CHAPTER IX.

OF CERTAIN EXCEPTIONS TO THE GENERAL RULE ON THE  
SUBJECT OF INTEREST.

**I**T has been stated, as a general rule, that all persons who gaining or losing by the event of a cause are incompetent to give evidence. To this general rule, however, there are several exceptions.

Some of these exceptions depend upon acts of parliament: as, where persons entitled to restitution of stolen goods, informers, inhabitants of parishes and other districts, are by express enactment, or by necessary implication, rendered competent witnesses in proceedings, in the issue of which they are interested. Other exceptions arise from necessity or a principle of public policy: as, where evidence is received from agents, factors, or servants,—notwithstanding that they may gain or lose by the event of the particular cause, in which their testimony is required.

Objections on the ground of interest, proceed upon the supposition of an undue bias in the mind of the witness, and on the public utility of rejecting partial testimony. The presumption of bias may be taken off by shewing, that the witness has an equal or a greater interest the other way, or that he has given up what interest he had. And the presumption of public

tected against the holder by a cross demand against the holder, *quare*, whether such cross demand, when set-off, is not equivalent to payment? And will not the drawer be entitled to call on the acceptor for the full amount of the bill, as much as if he had paid the full amount in money?" In an ordinary case of set-off, no doubt, this would be the case; but in *Mainwaring v. Mytton*, the set-off arose on a bill

indorsed by the witness to the defendant; and if the second bill was indorsed to the defendant, by way of satisfaction or security for the amount of the first, it is clear, if the defendant obtained the benefit of it by way of set-off in an action on the first bill, he could not sue the witness, as he might have done, if he had been compelled to pay the first bill from his own resources.



utility may be answered by shewing, that it would be very inconvenient under the particular circumstances, not to receive such testimony. (1)

In the last chapter, we have seen in what cases the bias, which is presumed to arise in the mind of a witness interested on one side of a particular cause, may be removed by shewing that such interest is counterbalanced by an equal or a greater interest on the other side. In the present chapter, it is intended to consider the particular cases, in which, on principles of public policy and utility, the admission of interested witnesses is allowed by the provisions of acts of parliament, or by the decisions of Courts of Law.

One of the most ordinary cases of exception to the general rule of interest arises in the case of the owner of stolen goods prosecuting the offender by conviction.

By the statute 7 & 8 Geo. 4, c. 29, s. 57, it is enacted, that in order to encourage the prosecution of offenders, if any person guilty of any felony or misdemeanor, mentioned in the statute, in stealing, taking, obtaining, converting, or knowingly receiving any property, shall be indicted for such offence by or on behalf of the owner of the property, or his executor or administrator, and convicted thereof, the property shall be restored to the owner or his representative: and a summary power is given to the Court to award restitution. Under this enactment, the party entitled to restitution has a direct interest in procuring a conviction; but notwithstanding this interest, he is a competent witness. This exception is founded upon the policy and intention of the statute, which gives the right of restitution: for the intention of the act was to facilitate the conviction of criminals by holding out an additional inducement to parties aggrieved to prosecute; and if the Courts were to determine that the right to restitution produced incompetency, the consequence would be, that instead of the conviction of criminals being facilitated, it would be rendered more difficult, from

Owner of  
stolen goods  
entitled to  
restitution.

(1) By Lord Mansfield, 1 Burr. 422.

the want of proper evidence. It is also observable, that the statute 21 H. 8, c. 11, which first gave the right of restitution, directs that it shall be awarded in those cases where the felon shall be attainted, "by reason of evidence given by the party robbed, or owner of the money, &c., or by any other by his procurement;" thereby expressly recognizing the competency of the owner as a witness. (1) And although the modern statute does not contain these words, yet its policy is the same, and the object of the enactment is expressly stated to be "in order to encourage the prosecution of offenders."

Restitution of  
goods and land  
—distinction.

We have seen, that in the case of an indictment under the statutes relative to forcible entries, the right of the tenant to an award of restitution of the lands is an interest which renders him incompetent. (2) The reason for this distinction, between the effect of a right to restitution of land and that of a right to restitution of goods, is that the statutes relative to forcible entries do not contain any provisions which expressly or impliedly recognize the competency of the tenant; and there is not the same ground of public policy requiring the reception of his evidence. An indictment for a forcible entry may be prosecuted at common law, and upon such an indictment, the tenant, not being entitled to restitution, would be a competent witness; less impediment therefore to the satisfaction of public justice arises from excluding his evidence upon an indictment under the statutes. (3) Upon these grounds it was decided, after consideration, by the Court of King's Bench, in the case *Rex v. Williams*, (4) that there was no sufficient reason for establishing an exception to the general rules of evidence in the case of a statutable indictment for a forcible entry, and that the tenant, being interested, was therefore an incompetent witness.

Persons enti-  
tled to rewards.

A variety of statutory rewards were formerly payable, upon the conviction of criminals, to persons who had been active in apprehending them and procuring their conviction; and it was

(1) Per Parke, J., 9 B. & C. 550,  
and see per Bayly, J., *ib.* 557.

(2) *Supra*, p. 66.

(3) See per Bayly, J., 9 B. & C.  
560.

(4) 9 B. & C. 549.

always held that persons entitled to these rewards were not incompetent witnesses. (1) This was upon the principle that the exclusion of their testimony would be inconsistent with the policy and spirit of the statutes giving the rewards, for (as in the case of restitution of goods before-mentioned) the object of the legislature was to stir up greater vigilance in the apprehension and prosecution of criminals, which intention would be defeated, if the expectation of a reward were to disqualify a witness, who would otherwise have been competent. (2) So where, instead of a pecuniary reward, a pardon is offered by the statute to any person guilty of a particular offence in case another person should be convicted upon his evidence, the party expecting the pardon is competent, such being the evident and express intention of the legislature. (3)

Statutory pardon.

Upon the same ground in actions, or prosecutions for bribery, it is no objection to a witness that he has been guilty of bribery himself, and will be entitled to an indemnity under the discovery clause of the 2 Geo. 2, c. 24, (4) in case of the conviction of the defendant, against whom he is called as a witness. (5) In these cases, as observed by Lord Ellenborough, the statute gives a parliamentary capacitation to the witness, notwithstanding his interest in the result of the cause; for it is not probable, the legislature would intend to discharge an offender upon his discovering another so that the latter might be convicted, without intending that the discoverer should be a competent witness. (6)

Trial for bribery.

We have seen that informers, who are entitled to the whole or any part of a penalty, are in general incompetent witnesses in support of any proceeding instituted for the recovery of such

Informers.

(1) See *Rudd's case*, Leach, Cr. Ca. 157, 158, 353, n. Hawk. P. C. b. 2, c. 46, s. 135.

(2) See 9 B. & C. 556. 10 Mod. 193.

(3) *Per cur.* *Rudd's case*, 1 Leach, 134, and see statutes 10 & 11 W. 3, c. 23, s. 5, and 5 Ann. c. 31, s. 4, (now repealed).

(4) *Bush v. Ralling*, Sayer, 289.

*Phillips v. Fowler*, cit. *ib.* 291. *Howard v. Shipley*, 4 East, 180. *Mead v. Robinson*, Willes, 425. *Sutton v. Bishop* Bur. 2283.

(5) Section 8. A similar enactment is contained in the Municipal Corporation Reform Act, 6 W. 4, c. 76, sect. 55.

(6) See 4 East, 183, and by Denison, J., Sayer, 289.

penalty. (1) But in the case of *Rex v. Teasdale*, (2) it was ruled by Lord Kenyon, that in an indictment under the statute 21 Geo. 3, c. 37, s. 1, for exporting machinery, an informer, who was entitled to the penalties imposed by the statute, was a competent witness, although there was no express provision in the act for admitting his evidence. In this case the informer appears to have been considered competent upon the same principle as the discoverer in cases of bribery; namely, by necessary intendment from the statute imposing the penalties, and in order to give effect to its enactments. Where a statute can receive no execution unless a party interested be a witness, there, says C. B. Gilbert, he must be allowed; for a statute must not be rendered ineffectual by the impossibility of proof. (3)

*R. v. Johnson.*  
*R. v. Luckup.*

On a prosecution under the statute 23 Geo. 2, c. 13, s. 1, for seducing artificers to go out of the kingdom, the prosecutor was held competent, though entitled to a moiety of the penalty. (4) And on a prosecution under the statute 9 Ann. c. 14, s. 5, the loser of money at cards was held competent to prove his loss. (5) But it appears that these cases are not to be considered as exceptions from the general rule upon interest; for the penalties imposed by the statutes are not recoverable by force of a conviction, but only by means of a distinct suit, in which the conviction would not be evidence; and therefore the witness is wholly free from interest in the event of the prosecution, which will neither advance nor prejudice his right to the penalties. (6)

Other exceptions.

Besides the cases above noticed, in which the evidence of interested witnesses is admitted in furtherance of the intention of some act of parliament, there are a variety of other cases in which interested witnesses are made competent

(1) *Supra*, p. 66.

(2) 3 Esp. N. P. C. 68.

(3) *Gilb. Evid.* 114.

(4) *R. v. Johnson*, Willes, 425, n. (c.)

(5) *R. v. Luckup*, Willes, 425, n. (c.)

(6) See 9 B. & C. 557, by Bayly, J., who appears to have considered that the admissibility of the witnesses in *R. v. Luckup* and *R. v. Johnson* was confined to cases of indictments.

by express enactment to this effect. Many of these enactments authorize the admission of the inhabitants of particular districts as witnesses upon trials, in the event of which the general body of the inhabitants of the district are interested. In these cases, the interest of any individual inhabitant (although sufficient to exclude him at common law) must be very trifling, and the various statutes alluded to, have been made in order to obviate the great inconvenience, that would result from excluding all the inhabitants of the district.

On an indictment for not repairing a public bridge or the highway adjoining, the inhabitants of the county, town, riding, &c. in which such bridge is situated, are rendered competent witnesses by the statute 1 Ann. st. 1, c. 18, s. 13. (1)

Inhabitants of county, &c., non-repair of bridge.

In an action against the hundred on the statute of Winton, by a party who had been robbed, the inhabitants of the hundred were rendered competent witnesses for the defence by the statute 8 Geo. 2, c. 16, s. 15. The party robbed was always considered to be a competent witness *ex necessitate*, (2) for it would be useless to give him the right of action, if he were not admitted as a witness to speak to facts, which in general no person could be expected to speak to but himself.

Hundred.

By the modern statute relative to actions against the hundred, for injuries arising from riotous assemblies, (3) it is enacted, "That in any action to be brought by virtue of this act against the inhabitants of any hundred or other like district, or against the inhabitants of any county of a city or town, or of any such liberty, franchise, city, town, or place, as is therein mentioned, no inhabitant shall by reason of any interest arising from such inhabitancy, be exempted or precluded from giving evidence either for the plaintiff or for the defendants."

(1) Even before the statute such evidence had been thought admissible from necessity. See *R. v. Carpenter*, 2 Shower, 47. 1 Ven-

tris, 351. *Gilb. Evid.* 113.

(2) See *Bul. N. P.* 187.

(3) 7 & 8 Geo. 4, c. 31, s. 5.

## Parish.

In actions against churchwardens or overseers of a parish for mispending money collected by them on behalf of the poor, parishioners, who do not receive alms or other gift out of the parochial funds, are made competent witnesses by statute 3 W. & M. c. 11, s. 12.

Summary convictions for penalties under 7 & 8 Geo. 4, c. 29 and c. 30.

So also in cases where pecuniary penalties, imposed on any offence, are directed to be applied to the use of the poor, or for the benefit and exoneration of the parish or other place, inhabitants are rendered competent witnesses on the trial of the offender by statute 27 Geo. 3, c. 29, provided the penalty does not exceed 20*l*. And in the case of summary convictions, under the provisions of the statutes 7 & 8 Geo. 4, c. 29, and 7 & 8 Geo. 4, c. 30, the evidence of the party aggrieved shall be admitted in proof of the offence, and also the evidence of any inhabitant of the county, riding, or division, in which the offence shall have been committed, notwithstanding any penalty or forfeiture incurred by the offence may be payable to the general rate of such county, riding, or division. (1)

## Highways.

By the general rule of law, the rated inhabitants of a parish, indicted for not repairing a highway, are not competent to give evidence for the parish. (2) But by the recent statute for consolidating the laws relating to highways (not turnpike), it is enacted, "That no person shall be deemed incompetent to give evidence, or be disqualified from giving testimony or evidence, in any action, suit, prosecution, or other legal proceeding to be brought or had in any Court of Law or Equity, or before any justice or justices of the peace, under or by virtue of this act, by reason of being an inhabitant of the parish in which any offence shall be committed, or of being a treasurer, clerk, surveyor, district surveyor, assistant surveyor, collector, or other officer appointed by virtue of that act." (3)

(1) See sect. 64 of the former statute and sect. 29 of the latter: Where the party aggrieved is admitted as a witness, he is not to receive any por-

tion of the penalty. Sect. 66 & 32.

(2) See 15 East, 474, and by Lord Ellenborough, 1 B. & Ald. 66.

(3) Stat. 5 & 6 W. 4, c. 50, s. 100.

By the general Turnpike Act, (1) it is also enacted, That the Turnpike acts  
inhabitants of any parish, township or place, in which any offence shall be committed contrary to that act, shall not be deemed incompetent witnesses by reason of their being such inhabitants. And by a subsequent statute, (2) it is enacted, That no person shall be deemed incompetent to give evidence in any action or other proceeding at law or equity, or before any justice under or by virtue of any act for making or maintaining any turnpike road, or under that act or the act of 3 Geo. 4, by reason of being a trustee or commissioner of such road, or a mortgagee or creditor of the tolls thereof, or a former lessee or collector of such tolls, or a treasurer, or clerk, or surveyor, or other officer under such act.

It will be observed, that the provisions respecting the competency of inhabitants, which have been hitherto noticed, only apply to a few particular cases, in which questions arise affecting the interests of parishes and other districts. But in order to provide more effectually against the inconvenience of excluding the testimony of the inhabitants at large, upon questions of this nature, a more general provision was made by the statute 54 Geo. 3, c. 107. Questions relating to rates, cesses, &c.

By the 9th section of this statute, it is enacted "that no inhabitant or person rated, or liable to be rated to any rates or cesses of any district, parish, township, or hamlet, or wholly or in part maintained or supported thereby, or executing, or holding any office thereof or therein, shall before any court or person or persons whatsoever be deemed and taken to be by reason thereof an incompetent witness for or against such district, parish, township, or hamlet, *in any matter relating to such rates or cesses*; or to the boundary between such district, parish, township, or hamlet; or to the settlement of any pauper in such district, parish, township, or hamlet; or touching any bastards chargeable, or likely to become chargeable to such district, &c., or to the recovery of any sum or sums for the charges or maintenance of such bastards; or the election or appoint-

(1) 3 Geo. 4, c. 126, s. 137.

(2) 4 Geo. 4, c. 95, s. 84.

ment of any officer or officers, or to the allowance of the accounts of any officer or officers of any such district, parish, township, or hamlet; any law, usage, statute, or custom, to the contrary in anywise notwithstanding."

*Meredith v.  
Gilpin.*

*Marsden v.  
Stansfield.*

This enactment has given rise to many questions, and the decisions upon its construction have been rather contradictory. One of the earliest cases which arose after the passing of the act, was an action of trespass against the overseers of a township, in which the question was, whether certain lands were vested in the overseers under a local act of parliament; and the Court of Exchequer decided, that a rated inhabitant of the township was not an incompetent witness on the part of the defendants, although the lands in question, if vested in the defendants, would be vested in trust for the township and in aid of the poor rates. The Court considered that the statute should receive a liberal construction, and that the matter in issue related to the rates. (1) In a subsequent case in the King's Bench, it was decided, that upon an issue directed by the Court, for the purpose of trying whether a certain messuage was situated within a chapelry, a person occupying rateable property within the chapelry was competent to prove that it was so situated. The Court said, that the burthen, of making out that a witness was incompetent, lay upon the party objecting to his testimony, and that nothing appeared to shew that the witness would be a gainer, by proving that the messuage was within the chapelry; and as the witness was only stated to be the owner of *rateable* property, and not actually *rated*, he was competent at common law, on the authority of *Rex v. Kirdford*. (2) They also said the case was plain according to the true construction of the statute, for the substantial question was, whether the owner of certain property was liable to contribute to the rates of the chapelry; and that was a question "relating to the rates or cesses" of the district. And the question, whether certain land was situate within the chapelry, was "a matter relating to the boundary between the district in question, and the adjoining district." (3)

(1) *Meredith v. Gilpin*, 6 Price, 146.  
(2) 2 East, 559.

(3) *Marsden v. Stansfield*, 7 B. & C. 815.



So also in a later case at *nisi prius*, it was ruled by Lord Tenterden, that in an action of debt by a surveyor of highways, against his predecessor in office, to recover the penalty imposed by the highway act for not accounting, inhabitants of the parish were competent for the plaintiff, although their evidence would tend to increase the funds in relief of the rates. (1) And this case was followed by another, in which Lord Chief Justice Tindal ruled, that such inhabitants were rendered competent by the statute, upon an indictment for the nonrepair of a bridge and highway within the parish, which it was alleged the defendant was bound to repair *ratione tenuræ*. (2)

*Heudebourck v. Langston and R. v. Hayman.*

On the other hand, it was decided by the Court of King's Bench in the case of *Oxenden v. Palmer*, (3) that in trespass against the surveyor of highways for a parish, who justified under a custom to take shingle from the sea beach, for the repair of the roads, inhabitant rate-payers of the parish were incompetent to give evidence for the defendant in support of such custom. Lord Tenterden, in delivering the judgment of the Court, said, that they entertained great doubt whether the case of *Meredith v. Gilpin* was properly decided, and observed that the statute related chiefly to the poor, and that although the words of the ninth section, when taken by themselves, would seem to apply to any rates or cesses, yet that the Court thought the matter in question did not strictly and properly relate to rates or cesses of the parish.

*Oxenden v. Palmer.*

So also, in a subsequent case, the same Court decided, that the rated inhabitants of a district, indicted for the non-repair of a highway, were not rendered by the statute competent witnesses for the defence. (4) And it has been also ruled at *nisi prius* by Lord Denman, that in an action for medical attendance on a pauper, against an overseer who was defending on the part of the parish, and in pursuance of an order of vestry, that a rated inhabitant, who had signed such order,

*R. v. Bishop Auckland.*

(1) *Heudebourck v. Langston*, Mood. & Mal. N. P. C. 402, n.

(2) *R. v. Hayman*, M. & M. N. P. C. 401.

(3) 2 B. & Ad. 236.

(4) *R. v. Bishop Auckland*, 1 Ad. & Ell. 744. 1 Mood. & Rob. 286, 287, n.

was not within the statute, and rejected his testimony which was offered on behalf of the defendant. (1)

But in a recent case at *nisi prius* it was ruled, on the trial of an ejectment by parish officers to recover a parish-house, that an occupier of rateable property within the parish was a competent witness on behalf of the lessors of the plaintiff. Mr. Baron Alderson there observed, that the statute enacted, that the party should not be incompetent in any matter relating to rates or cesses; and that the only way, in which his interest could be affected, was on the ground that the recovery of the property would diminish the rates or cesses. (2) Upon the same case coming subsequently before the King's Bench, the Court decided that the witness was properly admitted, apparently upon the ground that he was competent at common law, independently of the statute. (3)

Other excep-  
tions by statute.  
Local acts, &c.

In local acts of parliament it is not unusual to introduce clauses, rendering rated inhabitants of the district competent witnesses: and there are also several other exceptions de-

(1) *Tothell v. Hooper*, 1 Mood. & Rob. 392.

(2) *Doe v. Cockell*, 6 Car. & P. 525. The case of *Oxenden v. Palmer* was cited in this case.

(3) 4 Ad. & Ell. 478. The witness in this case being merely rateable, and not actually rated, appears to have been competent at common law upon the authority of *R. v. Kirdford*, 2 East, 559, recognised by Bayly, J., in *Marsden v. Stansfield*, 7 B. & C. 818. It was also argued in support of the competency of the witness, that if the matter did relate to the rates or cesses, he was rendered competent by the statute, and if it did not, that he had no interest whatever. Indeed, in all these cases, the objection to the witness's competency appears in some degree open to the charge of inconsistency, for the objecting party admits that the question relates to the rates and cesses of the parish, for the purpose of disqualifying the witness. In the case

of *Oxenden v. Palmer*, which is the leading authority for the limited construction of the statute, some reliance appears to have been placed upon the circumstance, that the main object of the statute was to provide for cases respecting the poor, but it was admitted, in the judgment of the Court, that the language of the ninth section was large enough to embrace objects not within the preamble. And it may perhaps be noticed as an inconvenience resulting from the decision in *Oxenden v. Palmer*, and the subsequent cases in accordance with it, that the effect of the construction adopted in those decisions is to admit the testimony of the witnesses, where the interest is plain and immediate, i. e. in cases where the question "strictly and properly relates to the rates or cesses," and to reject their testimony where the interest is more indirect and remote.

pending upon particular statutes, but which are not of sufficient general importance to be here noticed.

It may however be observed, that upon proceedings relative to seizures and penalties under the Customs Act, 6 Geo. 4, c. 108, it is provided by the fifth section of that statute, that officers, and persons acting in their aid and assistance, shall be deemed competent witnesses, on the trial of any suit or information on account of any seizure or penalty mentioned in the act, notwithstanding that such officer or other person may be entitled to the whole or any part of such penalty.

Revenue  
seizures and  
penalties.

In addition to the statutory exceptions hitherto considered in the present chapter, there are some common-law-exceptions to the rule of interest, which depend upon the principle of necessity, or of public policy.

Exceptions at  
common-law  
from necessity.

Thus, it is laid down by Mr. Justice Buller, that a party interested will be admitted, where no other evidence is reasonably to be expected; and this principle was acted on in the late case of *Lancum v. Lovell*, (1) argued before all the judges; in which it was decided, that in an action for toll claimed on a public road, persons who have refused to pay the toll were, from necessity, competent to give evidence against the claim, notwithstanding their interest in the result of the cause. This case arose before the statute 3 & 4 W. 4, c. 42, and the witnesses were objected to, on the ground that the verdict might be used as evidence against themselves in a subsequent action for the toll; but the judges were unanimously of opinion, that the witnesses were competent, notwithstanding this interest, upon the broad ground that the claim was in the nature of a public right, in which all the king's subjects were interested, and that no other evidence could be reasonably expected than that of persons of whom toll had been demanded. (2)

Question of  
public right.

(1) 9 Bing. 465.

(2) The Court seemed to think that the case of *Lord Falmouth v. George*, 5 Bing. 286, *supra*, savoured more of a private right;

but the distinction has become immaterial, since the 3 & 4 W. 4, c. 42, which removes the objection arising from the subsequent use of the verdict.

Agents, servants, &c. in the course of their employment.

The admission of the evidence of agents, servants, and factors has also been considered as an exception to the general rule, depending upon public policy; and Mr. Justice Buller says that this evidence is admitted "for the sake of trade and the common usage of business." (1) Formerly, when the rule of incompetency was more strict than in modern times, and when an interest in the *question* in dispute was considered as a test of competency, without reference to the inquiry whether the witness could derive actual benefit or disadvantage from the event of the cause, the reception of this description of evidence was, properly speaking, an exception to the general rule. But now, as the true criterion of competency is, whether a witness can derive any immediate gain or loss from the event of the cause, the evidence of agents, servants, and factors, for the purpose of proving contracts made by them on behalf of their employers would, probably in the great majority of cases, be admissible under the general rule, and not by way of exception. However, it is still laid down as an established principle, that the evidence of agents employed in ordinary transactions of commerce, is admissible *ex necessitate*, (2) notwithstanding they may be interested; and cases sometimes arise, in which the reception of their evidence could only be warranted on this ground.

Factors and brokers.

There are many cases which have been decided with reference to the competency of factor and agents to give evidence of matters within the scope of their employment. It has been held, that a factor may prove a sale in the course of his employment, though he is to receive a poundage on its amount; (3) or though he is to be entitled to what he has bargained for beyond a stated sum. (4) And a broker, who has effected a policy, is a competent witness, *ex necessitate*, to prove all matters connected with the policy, notwithstanding he may have an interest arising from a lien on the policy. (5) And it is laid down by Eyre, C. J., that the exception is not con-

(1) See B. N. P. 289. Fortesc. 247. Per Eyre, C. J., 2 H. Bl. 591. Upon the statute of this and other exceptions, see Bentham's Rationale, b. 9, c. 3, vol. 5, p. 66.

(2) By Lord Tenterden, 8 B. & C. 408. By Parke, J., 10 B. & C. 864.

(3) Dixon v. Cooper, 3 Wils. 40. 1 Atk. 248.

(4) Benjamin v. Porteus, 2 H. Bl. 590. R. v. Phipps, B. N. P. 289.

(5) Hunter v. Leathley, 10 B. & C. 858.

finer to mere agents and brokers, but that every man who makes a contract for another, comes within the description: but in a later case it appears to have been considered by Lord Tenterden, that the principle of the exception did not apply where the only agency, or connexion between the parties, arose out of the particular transaction in question. (1)

It is the common practice to admit servants and carriers, to prove the payment of a receipt of money, or the delivery of goods, on behalf of their master or principal. (2) Thus, if money has been overpaid by a servant, or paid by mistake, he is a competent witness in an action to recover it back. (3) And where the question was, whether, by the custom of a manor, a fine was due to the lord during his minority, on the tenant's admission, the steward of the manor was allowed to give evidence for the lord, though it was objected that he would be entitled to a fee on admission, which he would lose if the tenant were not admitted. (4)

Servants and carriers.

Steward of manor.

But though agents and brokers are competent to prove a sale or contract in the ordinary course of their employment, it has been decided, that they are not competent to prove that a contract has been properly executed, in an action against the principal for misconduct or negligence. Thus, in an action against an agent for misconduct, in purchasing goods of an inferior quality, Lord Chief Justice Gibbs rejected, as an incompetent witness, the broker of the defendant, who was called to prove that he had purchased goods of the best quality. (5) And where a person has entered into a contract for the purchase of goods in his own name, it has been ruled, that he is not a competent witness in an action for goods sold and de-

Agents incompetent to disprove negligence.

(1) *Edmonds v. Lowe*, 8 B. & C. 408.

(3) By *Holt, C. J.*, 11 Mod. 262. B. N. P. 289. See 4 T. R. 589, 590. *Matthews v. Haydon*, 2 Esp. N. P. C. 509. *Spencer v. Golding*, Peake N. P. C. 129. *Adams v. Da-*

*vis*, 3 Esp. N. P. C. 48.

(3) *Martin v. Howell*, 1 Stra. 647. *Barker v. Macrae*, 3 Campb. 144.

(4) *Champion v. Atkinson*, 3 Keb. 90. Rep. temp. Hard. 360.

(5) *Geyers v. Mainwaring*, 1 Holt, N. P. C. 139.

livered, to prove that he purchased them as the agent for the defendant. (1)

Agents acting  
out of scope of  
authority.

So also, where the act of the servant has been out of the ordinary course of his employment and a mere breach of duty, the principle does not apply; and it has been ruled, that in such a case the servant is incompetent without a release. Thus in an action to recover back money which had been entrusted to the plaintiff for a special purpose, and paid by the servant in illegal insurances, he was considered incompetent. And before the stat. 3 & 4 W. 4, c. 42, it was considered as a settled rule, in actions against a master for the negligence of his servant, that the servant was not competent to disprove the fact of his negligence. The cases on this subject have already been fully discussed in treating of incompetency by reason of a liability over, and in considering the effect of the late statute on this class of cases.

A few other cases of exceptions, standing upon special grounds, may here be noticed.

Issue from  
Court of  
Equity.

Upon issues sent from Courts of Equity, it is not an unusual thing to direct that the parties to the suit shall be examined at the trial as witnesses. It has been said in a case in the Court of Chancery upon this subject, that upon an order of this nature no objection is waived, except that which arises from the party being plaintiff or defendant in the cause. (2) And it has been ruled in a late case at *nisi prius*, that where a witness is interested in the result of a suit in equity, in consequence of the decree in the suit being evidence for or against his own claims on a subsequent occasion, he is not made competent, upon the trial of an issue directed in such suit, by the statute

(1) *McBraine v. Fortune*, 3 Campb. 317. See the preceding chapter as to the effect of the stat. 3 & 4 W. 4, c. 42, s. 26, on incompetency arising from liability over.

(2) See *Rogerson v. Whittington*, 1 Swanst. 39. The precise

meaning of this observation seems not very clear, but it appears to assume that a party to a suit is incompetent, *qua* party, and without reference to any interest in the event. But see per Tindal, C. J., 7 Bing. 398, *ante*, Ch. 6.

3 & 4 W.4, c. 42, s. 26, the language of which, as we have seen, only applies to cases where the objection is "on the ground that the *verdict* or *judgment* in the *action*" would be admissible for or against the witness. (1)

It has also been treated as an exception, from necessity, to the rule of incompetency from interest, that in an action for a malicious prosecution, the evidence which the defendant gave before the grand jury, in support of the indictment, is under special circumstances admissible on his behalf at the trial of the action. In *Johnson v. Browning*, the evidence given on that occasion by the defendant's wife, who was the only person present at the time of the supposed felony, and who, as the report says, could not herself be a witness, was admitted by Holt, C. J., on the ground, "that otherwise one that should be robbed would be under an intolerable mischief, for if he prosecuted for such robbery, and the party should be acquitted, the prosecutor would be liable to an action for a malicious prosecution, without the possibility of making a good defence, though the cause of prosecution were ever so pregnant." (2)

Action for malicious prosecution.—Evidence of prosecutor.

An exception, in the case of a person interested in the costs of a criminal prosecution, may occur on the trial of an indictment which the defendant removes by *certiorari*. In this case, the prosecutor is entitled to costs on the event of the indictment being found in his favour, but he is nevertheless, a competent witness, upon the special ground of the policy and intention of the statute; for the object of the statute was to discourage the removal of indictments; and if the defendant could disqualify the prosecutor from giving evidence, by removing the indictment, such removals would be encouraged and multiplied. (3) Upon an indictment for the non-repair of a road, power was given to the court by the Highway Acts, (4) to award costs against the prosecutor, if the prosecution appeared to be vexatious; but this provision does not

Interest in costs, under writ of *certiorari*.

(1) *Stewart v. Barnes*, 1 Mood. & Rob. 472.

(3) *R. v. Muscot*, 10 Mod. 193.

(2) See also *B. N. P.* 14, citing *Cobb v. Car.* 1746.

(4) See stat. 13 Geo. 3, c. 78, s.

affect the prosecutor's competency; (1) the evidence of the prosecutor is receivable according to the general rule, and, besides, the interest is uncertain, as the power of awarding costs is in the discretion of the Court. (2)

There are yet some other classes of cases, constituting exceptions to the general rule of evidence, founded on the policy of preventing an abuse of the rule.

Witness offering to surrender.

Where a witness offers to surrender or release his interest, and thus does all in his power to remove the objection to his testimony, but the other party refuses to accept the release, it will not be competent to such party to object to the witness's testimony, and his evidence may be received. (3) Or, if the interest may be removed by the release of one of the parties to the cause, and such party offers to remove it, and the witness refuses, he cannot thereby deprive the party of his testimony.

Legatee.

In the case of *Anstey v. Dowsing*, (4) indeed, Lee, C. J., expressed an opinion, that a legatee was not competent to prove the due execution of the Will, although payment of the legacy was tendered to him, which tender he refused. But the ground of this opinion was, that, even if he had accepted the legacy, he still would have been incompetent, as having been interested at the time of attestation;—a point, on which, though there has been some difference of opinion, the greatest authorities are in support of the contrary proposition, namely, that the payment of the legacy would restore the competency of the witness. (5)

Interest acquired fraudulently.

If a witness has acquired an interest in the subject-matter, for the mere purpose of depriving the party to the suit of the

(1) *R. v. Hammersmith*, 1 Stark. N. P. C. 357.

(2) See *R. v. Cole*, 1 Esp. 169.

(3) *Goodtitle v. Welford*, Doug. 134. Per Buller, J., 3 T. R. 35.

(4) 2 Str. 1253.

(5) *Vide infra*, Part 2, where the

proof of wills is particularly considered. *Wyndham v. Chetwynd*, 1 Burr. 414. *Doe d. Henderson v. Kersey*, 4 Burn's Ecc. Law, 97. It may be doubted whether the legatee, though paid, could retain the money, if the will were set aside.



benefit of his testimony, this ought not to exclude him from giving evidence. It was ruled by Lord Holt, in the case of *Barlow v. Vowel*, (1) that if a man be a witness of a wager, and afterwards bet himself, this shall not be a reason to except Wager. against his being sworn to prove the wager. And from analogy to this case, Lord Kenyon and Mr. Justice Ashurst were of opinion in the case of *Bent v. Baker*, (2) (where, on the trial of an action on a policy of insurance, the broker had been called as witness for the defendant, but rejected, because he had underwritten the policy after the defendant,) that even if it were true in general, that one underwriter could not be a witness for another, yet the witness ought to have been admitted in that case, as the defendant had acquired an interest in his testimony before the witness had signed the policy. And they laid down, as a general principle, deducible from the case of *Barlow v. Vowel*, that where a person makes himself a party in interest after a plaintiff or defendant has an interest in his testimony, he may not by this deprive the plaintiff or defendant of his testimony.

However, it appears to be rather doubtful, whether this proposition is not expressed in too large and general terms. The incompetency of a witness, on account of interest, must depend rather on the nature of the interest, than upon the time of acquiring it. The question on the *voire dire* is, whether he is interested at the time of his examination. If he is directly interested at that time, he is not a competent witness in general without a release, and it seems to be no answer to the objection, to show that he has become interested only since the commencement of the action, or since the time of his being acquainted with the fact which he is called to prove. Thus, before the 3 & 4 W. 4, c. 42, upon a trial on a customary right of common, a witness was incompetent, who admitted upon the *voire dire*, that he was in the occupation of a messuage, and that he claimed a similar right of common as annexed to his tenement; and it could not be material, whether he had been in possession for a number of years,

Interest acquired since cause of action.

(1) Skin. 586. See *Rescous v.* 736.  
*Williams*, 3 Lev. 152, and Cowp. (2) 3 T. R. 27.

or had the tenement only just before the trial of the cause. In either case he appeared to be equally incompetent: yet in the latter it might be said, that he had acquired his interest, after the party had become interested in his testimony. The case of *Barlow v. Vowell* must be considered as having been determined on the ground of fraud: the witness, proposed to be examined, was the original witness of the wager; it was a fraud, therefore, to deprive the party of the benefit of his testimony. (1)

Underwriter  
having paid.

In the subsequent case of *Forester v. Pigou*, (2) where the defendant, in an action on a policy of insurance, called another underwriter to prove the policy void on account of a misrepresentation of the nature of the risk, and upon the *voire dire* the witness stated, "that he had paid the loss to the plaintiff, upon an understanding that he was to be repaid in the event of this action failing, and that he had since received a letter from the plaintiff, promising to return the money in that event," an objection was taken to his competency, on the ground of his being interested in the event; the point was argued on the other side upon the authority of *Barlow v. Vowel*, and it was said, the witness had not become interested until after the commencement of the action, and that the plaintiff ought not to be allowed to defeat, by his own act, the interest which the defendant had in the witness's testimony; but the witness was considered to be incompetent and rejected: for although he would not be disqualified by any agreement *fraudulently* entered into between him and the plaintiff for the purpose of taking off his testimony, yet on the other hand the pendency of a suit could not prevent third persons from transacting business *bond fide* with one of the parties; and if an interest in the event of the suit is thereby acquired, the general consequence of law must follow, that the person so interested cannot be examined as a witness for that party, from whose success he will necessarily derive an advantage. A motion was afterwards made for a new trial on account of the rejection of this witness, as well as of another also, who was similarly situated; and a new trial was

(1) By Lord Ellenborough in *Forester v. Pigou*, 1 Maule & Selw. 9, in which this case was much cited.  
(2) 3 Campb. 380. 1 Maule & Selw. 9, S. C.

granted for the purpose of ascertaining more particularly the precise time, when the undertaking was made to the witnesses; but the Court added, that, if a person, who is under no obligation to become a witness for either of the parties to a suit, choose to pay his debt before-hand, upon a condition that is to be determined by the event of the suit, he becomes as much interested in the event, as if he were a party to a consolidation rule.

In a more recent case in the Common Pleas, where the plaintiff in an action on a charter party had communicated to the attesting witness an interest in the profits, which were expected to arise from the adventure, the witness who refused to release his interest was rejected, as incompetent at the trial; and the Court held, that his evidence was inadmissible, upon the ground that he had derived his interest immediately from the plaintiff, who proposed to call him, and that the plaintiff could not justly complain that his witness was disqualified, when he himself was the cause of his disqualification. (1)

Lord Raymond, in the case of the *King v. Fox*, (2) admitted the prosecutor to be a witness, although he had laid a wager, that he should convict the defendant: and the true reason seems to be, not because the witness had made the wager at a time when public justice became interested in his testimony, but because it would be against public policy to allow a witness, by any such gratuitous act, to exclude himself from giving evidence. In addition to this, it may be observed, that the wager would now probably be considered absolutely void, on a principle of public policy, as tending to produce an improper bias on the mind of the witness, and therefore as directly prejudicial to the administration of justice.

Wager on conviction.

(1) *Hovill v. Stephenson*, 5 Bing. 493. Best, C. J., in delivering the judgment of the Court, said, the case of *Forrester v. Pigou* was stronger than that before the Court. It was also held that evidence of the witness's handwriting was inadmissible. In general,

where an attesting witness, subsequently to the execution of the instrument, becomes interested by operation of law, evidence of his handwriting is admissible. *Post*, Part. 2.

(2) 1 Str. 652.

## CHAPTER X.

## OF THE MODE OF OBJECTING TO THE COMPETENCY OF AN INTERESTED WITNESS, AND OF THE MEANS OF RESTORING COMPETENCY.

**I**T is proposed to consider, in the present chapter, what is the regular mode of objecting to the competency of a witness, on the ground of interest, and what are the means of restoring his competency.

Objection  
when taken.

The rule formerly was, that the objection ought to be made on the *voire dire*, and that if made after the examination in chief, it would not have the effect of excluding the witness. But the strictness of the rule on this subject has been relaxed, and now, if it be discovered during any part of the witness's examination, or even after his cross-examination, that he is interested, the objection may be taken, and his evidence will be struck out. (1) It has, indeed, been laid down, that the objection may be taken at any stage of the cause; (2) but it was ruled at *nisi prius*, in a case before Gibbs, C. J., where the examination of a witness had been completed, and he had left the box, but was recalled by the judge for the purpose of asking him a question, that it was too late then to object to his competency. (3) At all events, it is clear that the objection should be made during the trial, and that a new trial will not be granted, on the ground of the objection to the competency of a witness being discovered after the trial was concluded. (4)

(1) See *Turner v. Pearce*, 1 T. R. 720. *Stone v. Blackburn*, 1 Esp. 37. By Lord Ellenborough, 2 Campb. 14.

(2) Per Lord Kenyon, 1 Esp. 37.

(3) *Beeching v. Gower*, Holt, N. P. C. 314. And where a party has been fully apprized of the grounds of a witness's incompe-

tency by the opening speech of counsel, or the examination in chief of the witness, doubts have been entertained at *nisi prius*, whether an objection to the competency of a witness can be postponed.

(4) *Turner v. Pearce*, 1 T. R. 720.

It seems also, that when witnesses have been examined on interrogatories, which are afterwards read on the trial of a cause, it is too late to object to their competency on the ground that they appear, from the depositions, to be interested; and that the objection ought to have been taken at the time of examination, or upon application to the court to suppress the depositions before their production at the trial. (1)

The party, against whom a witness is called, may examine him respecting his interest on the *voire dire*, or may call another witness, and produce other evidence, in support of the objection. If the fact of interest is satisfactorily proved by other evidence, the witness will be rejected, though he may have ventured to deny it on the *voire dire*. (2)

How raised.

Where the interest of the witness arises from some written instrument, which is not produced, he may be examined as to the contents of it, on the *voire dire*. The general rule, which requires the production of the instrument itself, or that a notice to produce it shall be given before a witness can be examined as to its contents, does not apply to such a case; for the objecting party may be ignorant of its existence before the examination of the witness, and he cannot be supposed to know that a particular witness would be called on the other side. If, however, the witness himself produces the instrument, it ought, of course, to be read as the best evidence of the witness's situation. (3)

Examination on *voire dire*.

When the objection arises from a witness's answer on the *voire dire*, it may likewise be removed on the *voire dire*. Thus, in an action brought by a chartered company, where a witness for the plaintiff admitted, on the *voire dire*, that he had been a freeman of the company, but added, that he was then disfran-

Objection removed on *voire dire*.

(1) *Ogle v. Paleski*, Holt, N.P.C. 485. *Anon.* 2 Tidd's Prac. 812, 9th edit.

(2) The old rule appears to have been that the statement of a witness, who had been examined as to the fact on the *voire-dire*, and denied

that he was interested, could not be contradicted. See by Lord Hardwicke, in Lord Lovat's case, 9 St. Tr. 647, fo. ed. 10 How. St. Tr. 596

(3) *Butler v. Carver*, 2 Stark. N. P. C. 434.

chised, Lord Kenyon ruled, that it was not necessary to prove the disfranchisement by the regular entry in the company's books, and that the witness was competent. (1) In a case where a witness, examined on a settlement question, stated on the *voire dire*, that he occupied a cottage in the appellant's township, but that he was not rated, nor did he pay any public rate, the Court of King's Bench held, that there was no ground for objecting to his competency, and that it was not necessary for the appellant, who called him, to produce the rate as the best proof of his not being rated. (2) So, in an action by an administrator, where a witness, called for the plaintiff, admitted that he was next of kin, and was objected to on this ground, but answered, on re-examination, that he had released all his interest, this was held by Lord Ellenborough to remove the objection. (3)

Objection not  
removed on  
*voire dire*.

It is here necessary to mention two cases which have recently been decided at *nisi prius*. In an action by a bankrupt's assignees, where the bankrupt, being called as a witness for the plaintiffs, stated that he had obtained his certificate, and released his surplus, it was ruled by Best, C. J., that the certificate and release ought to be produced, or their non-production accounted for. (4) And in a subsequent case at *nisi prius*, in which the same point arose, Tindal, C. J., observed, that the difficulty was, that the objection did not arise on the *voire dire*, but appeared from the pleadings themselves, and seemed to think that it was necessary to produce the release, which the bankrupt stated he had given to his assignees. (5) But there appears to be no sound distinction between these cases, and those cited to illustrate the rule, that where the objection arises on the *voire dire*, it may be removed on the *voire dire*. And it may be observed, that the objection can never appear from the pleadings alone without a question put to the witness himself. This view of the sub-

(1) *Butcher's Company v. Jones*, 1 Esp. N. P. C. 162. *Botham v. Swingle, Peake*, N. P. C. 218, 1 Esp. 164, S. C.

(2) *R. v. Gisburn*, 15 East, 57.

(3) *Ingram v. Dade*, Lond. Sitt. after Mich. T. 1817.

(4) *Goodhay v. Hendry*, Mo. & Ma. N. P. C. 319.

(5) See Mo. & Ma. 321, n.

ject appears to have been entertained in a subsequent case, decided by Parke, B., where the same point arose. (1) And it has also been ruled, by Park, J., in a similar case, that this objection may be removed on the *voire dire*. (2)

Where the party calling a witness, who has been objected to on the *voire dire*, attempts to remove the objection by other independent proof, and not by a further examination of the witness on the *voire dire*, he will be subject to all the ordinary rules of evidence, and the best proof will be required, according to the nature of the case. Thus, if another witness is called to prove that the witness, who has been objected to on the ground of interest, has been released, he cannot be allowed to speak of the contents of the release, but the release itself, if in existence, ought to be produced. (3)

Whatever interest a witness may have had, if he is divested of it by release or payment, or by any other means, when he is ready to be sworn, there is no objection to his competency. Thus it is said "to have been solemnly agreed by the Judges, that where a person had a legacy given him and did release it, he was a good witness to prove the will." (4) \* So a release

Release.

(1) *Wandless v. Cawthorne*, Mo. & Ma. 321, n.

(2) *Carlile v. Eady*, 1 C. & P. 234.

(3) *Corking v. Jarrard*, 1 Campb. 37, and see by Lord Kenyon, *Botham v. Swingler*, 1 Esp. N. P. C.

164.

(4) *Vin. Ab. tit. Evidence*, '14, n. 53, cited by Lord Mansfield, 1 Burr. 423. The competency of the witness does not depend on the language of the statute, *ibid.* 417.

\* Lord Chancellor Hardwicke established the will of Lord Ailesbury on similar proof, in the year 1748. (See 1 Burr. 427.) And in *Wyndham v. Chetwynd* (1 Burr. 414,) where the subscribing witnesses were creditors of the testator, as their debts had been paid, they were admitted to prove the will. So in *Doe dem. Hindson v. Kersey*, (4 Burn. Ec. Law, 97,) three of the judges were of opinion, that a subscribing witness was restored to his competency, if all his interest had been released or extinguished at the time of the examination. Lee, C. J., in *Anstey v. Dowsing*, (2 Str. 1253), and Lord Camden, C. J., in *Doe on the demise of Hindson v. Kersey*, were of opinion, that if a subscribing witness was interested at the time of attestation, nothing *ex post facto* could give effect to his attestation. In the former of these cases, Mr. Justice Dennison differed from Lee, C. J., on this point. (See 1 Burr. 427, 428.)

from the drawer of a bill of exchange to an acceptor will render the latter a competent witness. (1)

General release.

A general release of all actions and causes of action, for any matter or thing which has happened down to the time of the release, will discharge the witness from all liability depending upon the event of the existing suit. Such a release from a defendant, who had drawn a bill of exchange, to the witness, who accepted it, was held to have this effect (2); for, as Lord Ellenborough said in that case, the transaction was already past, which was to lay the foundation of future liability; and if the drawer should have a cause of action against the acceptor, it would have reference back to the acceptance, and would be discharged by the release. A similar point arose in the case of *Cartwright v. Williams*, (3) where the defendant was the acceptor, and the witness was one of the drawers, for whose accommodation the bill had been accepted; there the witness was bankrupt, and it was objected that a release to the assignees was necessary, in addition to the general release, since the defendant, as surety, might prove the debt under the commission of the witness, in case the plaintiff should recover in this action; but Lord Ellenborough held, and the Court of King's Bench were afterwards of the same opinion, that the release in question, comprehending all future claims, in consequence of any cause existing at the time of granting the release, would extend to bar any claim of the defendant as surety on the bill, this being an inchoate cause of action then existing. (4)

But in an action by an administrator, where a witness called for the plaintiff was entitled to a distributive share of the intestate's estate, it was held by the Court of Exchequer, that his competency was not restored by giving a release to the administrator, of all causes of action from the beginning of the world to

(1) *Scott v. Lifford*, 1 Campb. 249.

(2) *Scott v. Lifford*, 1 Campb. 249.

(3) 2 Starkie, N. P. C. 342.

(4) See also by Best, C. J., 4 Bing. 652, and see *Wilson v. Hirst*, 4 B. & Ad. 760.



the date of the release, for it was said, such a release would not affect the witness's right to a share of the proceeds of the action, in case the administrator recovered. (1)

In an action by a minor who appears by his guardian, a release by the latter will not be sufficient, the guardian not having any authority to release. (2) A release of a bond debt by one of several obligees will operate as a release by all; (3) And a release to one of several obligors, will have the same effect as to all the others, whether the bond be joint, or joint and several. (4)

By minor.

Release of  
bond debt.

In a case at *nisi prius*, where it appeared that several persons had agreed equally to bear the expenses of a joint undertaking, and an action was brought against one of them, it was ruled, that another of the contractors was rendered a competent witness for the defendant, if released by him, though the rest did not join in the release. (5)

Several contractors.

It seems to have been ruled by Lord Tenterden, in an action brought against one of several persons, who were partners in business, that the defendant could not, by means of a release, make his partner a competent witness for him: (6) and in an earlier case, (7) Lord Alvanley is said to have expressed an opinion, that a partner of the defendant could not be made a competent witness for him by means of a release, on the ground, that, if the defendant died or became insolvent, the plaintiff would have a right, by a bill in equity, to compel all the partners to contribute. But in a late case in the Court of King's Bench, this doctrine appears to have been overruled. It was there decided, that in an action against two partners, to recover the balance of a banking account extending over several years, a witness called for the

Partners.

(1) *Matthews v. Smith*, 2 Y. & J. 426.

(2) *Fraser v. Marsh*, 2 Stark. N. P. C. 41.

(3) *Bayley v. Lloyd*, 7 Mod. 250.

(4) Co. Lit. 232, a. 2 Roll. Abr. 412 (G.) 1 Bos. & Pul. 630.

(5) *Duke v. Pownall*, Mo. & Ma. N. P. C. 430.

(6) *Simons v. Smith*, Ry. & Mo. N. P. C. 29. The reason for this decision is not mentioned.

(7) *Cheyne v. Koops*, 4 Esp. N. P. C. 112.

defendants, who admitted that he had been a partner with the defendants during a part of the time over which the account extended, was rendered competent by the effect of general releases from the witness to the defendants, and from the defendants to the witness. (1)

**Part-owners.**

In the recent case of *Jones v. Pritchard*, (2) it was held, in an action for work done to a vessel, brought against one part-owner, that another part-owner is a competent witness for the defendant, after a release; a release from the witness was not considered necessary.

**Residuary legatee.**

A residuary legatee is not rendered a competent witness, in an action by an executor to recover a debt due to the testator, by releasing all claim to the debt in question; for if the plaintiff fail in the suit, although he would not be liable for costs to the opposite side, he must pay costs to his own attorney; and the executor would be entitled to the allowance of these costs out of the estate, the action being brought *bond fide*; thus independently of the debt to be recovered, the residue would be diminished. The witness, therefore, has still an interest to support the action, and can only be rendered competent by releasing the residue, or by a release of the costs of the action from the attorney. (3)

**Stamp of release.**

Where the defendant in an action executed a release to a witness, but before it was given to the witness it was handed to the plaintiff's counsel, who objected to the form, on which

(1) *Wilson v. Hirst*, 4 B. & Ad. 760. It was considered that the future right which was released, had a foundation and original inception at the time of the release, and was a necessary and common liability, and that, therefore, the rule in *Lampet's* case, 10 Rep. 506, was satisfied.

(2) 2 M. & Wel. 199, see *Young v. Bairner*, 1 Esp. 103; *Goodacre v. Breame, Peake*, 174; *Jennings v. Griffiths*, R. & M. 42; *Moody v. King*, 2 B. & C. 558.

(3) *Baker v. Tyrwhitt*, 4 Campb. 27; and see *Carter v. Abbot*, 1 B. & C. 144. *Perryman v. Steggel*, 8 Bing. 369, as to its being necessary for the bankrupt to release his surplus to his assignees, or to obtain releases from his creditors, besides being released by the party who calls him. In *Carter v. Abbot* three releases were given. In *Perryman v. Steggel*, the general release was held insufficient.

it was altered and re-executed, the release was held sufficient, and that a new stamp was unnecessary. (1) And in a late case, in which the defendant in an action executed a release to one of the witnesses before the trial, and gave it to his attorney, and at the trial it appeared that another witness would require to be released, and his name was accordingly inserted, and the release re-executed before it had been delivered out of the attorney's possession, it was held by the Court of Exchequer, that the instrument was still *in fieri* at the time of re-execution, and did not therefore require a fresh stamp. (2)

Where the defendant has suffered an incompetent witness to be examined, on the undertaking of the plaintiff's attorney to execute a release to him after the trial, and the plaintiff has obtained a verdict, a new trial will not be granted, on the ground that the release has not been given, but the witness will have a remedy on the undertaking. (3)

Undertaking to release.

When a witness is objected to as a member of a corporation, whose interests are in question, his competency may be restored either by his resignation, (which will be effectual even by parol, provided it has been accepted, and another person elected in his place,) (4), or by disfranchisement. The method of disfranchisement is said to be by an information in the nature of a *quo warranto* against the member, who then confesses the information, and upon that there is judgment of disfranchisement. (5) This judgment must be such as cannot be avoided; for if it appear that the witness can avoid the judgment for irregularity, (as he may, if he has never been summoned, and knew nothing of his disfranchisement,) he is not competent. (6)

Member of corporation.

It has been seen that the competency of a witness who is Bail.

(1) *Alton v. Farren*, 5 Car. & P. 513.

(2) *Spicer v. Burgess*, 1 C. M. & R. 129. 4 Tyr. 598. *Qu.* as to the sufficiency of a single stamp on a release to two witnesses. See per Lord Lyndhurst, 4 Tyr. 605.

(3) *Heming v. English*, 1 C. M.

& R. 568. 5 Tyr. 185.

(4) *R. v. Mayor, &c. of Ripon*, 2 Salk. 432. *Com. Dig.* tit. Franchise (F. 30.)

(5) The case of the Mayor, &c. of Colchester, 1 P. Wms. 595, n.

(6) *Brown v. Corp. of London*, 11 Mod. 225.

Obligor for  
costs.

Release re-  
fused.

the defendant's bail, may be restored by applying to the Court to strike out his name from the bail piece, or by depositing a sum of money in Court at the trial of the cause as a security for the debt and costs. (1) So, a witness called for a plaintiff, who is liable to the defendant upon a bond for the costs of an action, will be allowed to deposit the amount of the penalty of the bond with the officer of the Court, and his evidence will then be received. (2) It has also been noticed, that if a witness offers to release or surrender his interest, and executes a release accordingly, his competency is restored, though the party refuses to accept his release.

## CHAPTER XI.

### PRIVILEGE OF WITHHOLDING EVIDENCE, AND INCOMPETENCY OF WITNESSES TO GIVE EVIDENCE UPON PARTICULAR SUBJECTS.

**I**N the preceding chapters, we have considered the grounds of incompetency of witnesses, arising from want of understanding, defect of religious principle, infamy of character, and interest in the event of the suit. The objection to witnesses from these causes depends upon one principle, the want of personal credit attaching to the testimony of the witnesses. We proceed now to treat of certain other grounds for the exclusion of evidence, depending on various principles. These will be treated of in the following order:—

1. The privilege of the parties to a suit from being examined.
2. The incompetency of the husband or wife of parties to the suit.
3. The exclusion of matters of evidence disclosed in professional confidence.

(1) *Baillie v. Hole*, Mo. & Ma. N. P. C. 290, and see *Pearcey v. Heming*, 5 Car. & P. 503.

(2) *Lees v. Smelt*, 1 M. & Ro. 329.

4. The exclusion of matters of evidence the disclosure of which would be prejudicial to public interests.

Analogous to these grounds for the exclusion of evidence are various others established for the protection of witnesses, as upon questions relative to their previous life and character, or tending to criminate themselves, or to subject themselves to forfeitures, or occasioning a disclosure of their title to property; these will be more properly considered in the chapter which treats of the examination of witnesses.

#### SECTION I.

##### *Of the Privilege, of Parties to the Suit, from being Examined.*

A party to the suit is never compelled, on trials before a jury, to give evidence for the opposite party against himself. Inconvenience from the exclusion of evidence of this description is not extensively felt in practice; as, notwithstanding the ordinary tests to which the testimony of witnesses is subjected, parties would perhaps rarely venture to avail themselves of the testimony of their adversaries. It would seem, however, that the rule in question originated from some apprehension of the vexation and inconvenience which might ensue, if a person were bound to prejudice or accuse himself: *nemo tenetur seipsum prodere*. It may be doubted, whether this maxim is altogether consistent with the strict administration of impartial severe justice. Thus much may be said for the rule, that it shuts out opportunities of false swearing and perjury; and, in criminal trials, saves the judges from the necessity of questioning prisoners to their conviction,—a practice, which in some instances might be ill employed, and would generally give offence to public feeling. (1)

(1) The practice of interrogating the prisoner by the Court was very common in the early state trials, and was not abandoned at the Revolution. It seems to have been required on the part of magistrates, previous to committing prisoners, though this power is not usually exercised. See *post*, Depositions

and Examinations. On the subject of the exclusion of the testimony of parties to suits, see Bentham, *Rationale of Judicial Evidence*, book ix. ch. 3, 4, 5, where the proceeding is not before a jury, the maxim *nemo tenetur seipsum prodere* is frequently departed from in our jurisprudence.

Rated inhabitants.

On a question of settlement, it has been determined in the case of the *King v. Woburn*, (1) that the rated inhabitants of either parish, being in reality parties to the proceedings, can not be compelled to give evidence against their own parish. So, in an action of ejectment, on the several demises of two lessors, one of them is not compellable to give evidence for the defendant, though no title has been proved under his demise. (2) The lessors of the plaintiff, said Lord Ellenborough, are substantially the parties on the record; all are jointly liable; that lessor, upon whose title the recovery proceeds, is generally the trustee of the other; and there are the same reasons for protecting them from being examined, which have produced the general rule of law, that the parties on the record cannot be compelled to give evidence against themselves, and are not permitted to swear in their own favour.

Co-plaintiff witness against another.

In the case of several plaintiffs or defendants, the privilege is personal to each plaintiff and defendant. Where one of several co-plaintiffs comes forward voluntarily to disprove the defendant's liability to the demand made upon him, it has been held, that, with the consent of the adverse party, he may be admitted, though at the same time he defeats the claim of those, who jointly sue with him (3): for, if the plaintiff were to make a declaration against his interest out of court, evidence of that declaration would be admissible; and how is the proof less credible, said C. J. Mansfield, if, with the consent of the defendant, who waives all objection to his testimony, he declares the same thing upon oath at the time of trial.

(1) 10 East, 403. This case was decided before the statute 54 Geo. 3, ch. 170, s. 9. It does not appear to be determined, whether, since that statute, parishioners are compellable to give evidence, or are merely rendered competent. The same question arises upon the various other statutes making rated inhabitants competent witnesses.

(2) *Fenn dem. Pewtress v. Granger*, 3 Camp. N. P. C. 178.

(3) *Norden and another v. Wil-*

*liamson*, 1 Taunt. 378, by Mansfield, C. J., and Chambre, J., who were the only judges present. And see *Worrall v. Jones*, 7 Bing. 395, ante. It does not appear to have been considered, whether persons, whose admissions are evidence against parties to a suit, on the ground of their being the real, though not nominal, parties to a suit, are privileged from giving evidence.

## SECTION II.

*Incompetency of Husband or Wife of Parties to the Suit.*

It seems to follow, as a consequence, from the principle on which witnesses are excluded on account of their interest in the event of a suit, that wherever the testimony of a person is inadmissible upon this ground, that of the wife or husband of such person should be rejected, in consequence of the identity of interest created by the relation of marriage.

Husband and wife not competent for each other.

In an action, brought by the executrix of a surviving trustee under a marriage settlement, to recover back the value of certain goods which had been sold by the defendant, as sheriff, under an execution against the husband of the *cestui que trust*, the husband was not admitted to prove, on the part of the plaintiff, that the goods had been conveyed in trust to the plaintiff for the separate use of his (the witness's) wife; for the wife was substantially the plaintiff in the suit. (1) A husband is incompetent to give evidence in support of the interest of his wife, who takes a reversion in fee in the property in dispute. (2) So it has been held, that as the bail of the defendant cannot give evidence in his favor, the wife of the bail is likewise incompetent. (3) And the wife of a bankrupt cannot be examined to prove his bankruptcy. (4)

In civil cases.

On a prosecution of several persons for a conspiracy, Lord Ellenborough, C. J., refused to admit the wife of one of the defendants to be a witness for the others; a joint offence being

Criminal cases.

(1) *Davis v. Dinwoody*, 4 T. R. 678, and see *Anslay v. Donney*, 2 Str. 1253.

(2) *Hatfield v. Thorp*, 5 B. & A. 91.

(3) *Cornish v. Pugh*, 8 D. & R. 65.

(4) *Ex parte James*, 1 P. Wms. 611. The declarations of a wife, even when living separate from her hus-

band, have been held not to be admissible for him in an action for necessities. *Hodgkinson v. Fletcher*, 4 Campb. 70. The Court of Common Pleas, however, doubted as to the admissibility of her confessions as to adultery for him in an action by her trustee. *Scholey v. Woodman*, 1 Bing. 349.

charged, and an acquittal of all the other defendants being a ground of discharge for the husband. (1)

On the trial of an indictment against two prisoners for burglary, in which each of them set up the defence of a distinct *alibi*, it was proposed, on the part of one of the prisoners, in proof of his *alibi*, to call the wife of the other prisoner; but her evidence was rejected, on the ground of tending to shew that the witness for the prosecution was mistaken as to one of the prisoners, which would weaken the effect of that witness's testimony, as to the other prisoner, her husband. It was decided, by a majority of the Judges, that the witness had been properly rejected. (2) But this case must be understood as having been decided on its own peculiar circumstances, and not as warranting the conclusion, that where prisoners set up a separate and distinct defence, the wife of one prisoner cannot in any case be a witness for another prisoner.

#### Exceptions.

There are certain excepted cases, in which the evidence of husband or wife is admissible against the other,—which will be presently considered. It is a general rule, in such cases, that if the evidence of husband or wife is admissible against the other, it is likewise admissible in the other's favor. (3)

#### Husband and wife not competent against each other.

It has been deemed expedient, as a principle of public policy, to exclude the testimony of a husband or a wife against the other. It has been resolved, says Lord Coke, (4)

(1) *R. v. Locker and others*, 5 Esp. 107. *R. v. Frederick and another*, 2 Str. 1094, S. P., where material evidence had been given against the husband, and it was impossible to separate the cases of two joint trespassers.

(2) *Rex v. Smith and another*, Moody's Cr. Ca. 289. It should be remarked, though it is not stated in the report, the only witness for the prosecution, who identified either of the prisoners, was the person whom the wife of one of the prisoners was called to prove mistaken as to the identity of the other pri-

soner.

(3) Per Lord Tentarden, in *R. v. Sergeant*, R. & M. 354, citing *R. v. Berry*.

(4) Co. Lit. 6, and see per Lord Ellenborough in *R. v. Luffe*, 8 East, 202, "in any matter affecting the husband's interest or character." The law of Scotland, 18 Howell's St. Tr. 580, n. Alison's Prac. Cr. L. 463, and that of America, Kent's Commentaries, vol 2, p. 149, do not allow a husband or wife to be witnesses for or against each other.



that a wife cannot be produced against her husband, as it might be the means of implacable discord and dissension between them. The risk of an occasional failure of justice has been regarded as outweighed by the necessity of protecting the confidence of domestic life. This rule holds equally both in civil and in criminal cases.

In an action brought by a woman as *feme sole*, the defendant cannot call the plaintiff's husband to prove her married, and thereby to nonsuit her. (1) Civil cases.

The husband and wife are not, in general, allowed to be witnesses against each other, in criminal proceedings. In a prosecution for bigamy, the first husband cannot be admitted to prove the former marriage against the wife. (2) Such evidence would directly criminate, and therefore is not admissible. On a prosecution against a woman and others for a conspiracy in procuring a marriage between her and her husband, the husband is not allowed to be a witness in support of the prosecution. (3) It seems to be the better opinion, that a wife is not compellable to give evidence against her husband upon a charge of high treason. (4) Criminal proceedings.

(1) *Bentley v. Cook*, cited in *R. v. Cliviger*, 2 T. R. 265, 269. See *Colvin v. Fraser*, 2 Hagg. Eccl. Ca. 277, n. *Jourdain v. Lefevre*, 1 Esp. 66. *Dale v. Johnson*, Str. 568. Per Lord Eldon, 15 Ves. 165.

(2) *Grigg's case*, Sir T. Raym. 1. *Sedgwick v. Watkins*, 1 Ves. Jun. 49. It may, perhaps, be thought that the evidence of a first wife might not improperly fall within the principle of the exceptions hereafter noticed.

(3) *R. v. Sergeant and others*, Ry. & Mo. 352, before Lord Tenterden, upon the authority, principally, of the converse case of *R. v. Locker*, 5 Esp. 107, *ante*. It is laid down in *Hale*, P. C. 301, that a woman is not bound to be sworn, nor to give evidence against another in case of theft, if her husband be

concerned, though her evidence be material against another, and not directly against her husband. In adverting to this passage, Lord Ellenborough, 6 M. & S. 194, observes, that admitting the authority of the passage, it assumes that the husband was under the criminal charge, that he was included in the *simul cum aliis*. See the case of *R. v. Smith* and another, *ante*. That a mere expectation of benefiting the husband, as, by giving evidence against an accomplice, does not exclude, see *R. v. Rudd*, Leach, 133.

(4) The great authority of Lord Hale is in favor of the wife not being compellable to give evidence, *Hale's P. C.* 301; see also *Brownl. 47*. *Dictum* in *Grigg's case*, Sir T. Raym. cited *Gilb. Ev.* 19, and *B. N. P.* 289, *contra*.

Extent of the  
rule.

In cases where the husband or wife are directly interested in the event of the proceeding, the principle of the rule for the exclusion of their testimony is carried to its full extent. Thus, it has been held that a wife is an incompetent witness against her husband, although the marriage took place after the wife was served with the subpoena to give evidence in the suit. (1)

Consent of  
husband.

Whether the rule of exclusion is to be relaxed, where a husband consents to his wife being examined as a witness against him, is left somewhat in doubt by the authorities. In a case before Lord Hardwicke, C. J., he would not suffer a woman to be a witness, though her husband consented. (2) In the case of *Pedley v. Wellesley*, (3) Chief Justice Best expressed his willingness to receive the evidence of the defendant's wife, if the defendant had consented, but the defendant refused his consent. Where a party consents that his wife shall be examined as a witness against himself, there can be no violation of confidence, which is a principal ground of the rule of exclusion, but the probability, that if such evidence were generally admitted, family dissensions might be increased, is not altogether obviated by the circumstance of consent.

Extent of the  
rule.  
Collateral pro-  
ceedings.

Although the husband and wife are not allowed to be witnesses against each other, where either is interested in the event of a proceeding whether civil or criminal, it seems to be the better opinion, that, in collateral proceedings, not immediately affecting their mutual interests, their evidence is receivable, notwithstanding it may tend to criminate each other, and notwithstanding the testimony of the one contradicts that of the other, or subjects the other to a legal demand.

Evidence  
tending to  
criminate.

According, indeed, to the rule laid down in the case of the *King* against the *Inhabitants of Cliviger*, (4) a husband or wife ought not to be permitted to give any evidence that may even tend to criminate each other. In that case, on an appeal against an order of removal of a pauper and also of a woman

(1) *Pedley v. Wellesley*, 3 Car. & temp. Hard. 264.  
P. 558.

(2) *Basker v. Sir W. Dixie*, Rep.

(3) 3 C. & P. 558.

(4) 2 T. R. 263.

as his wife, the respondents having proved the marriage, the appellants called the pauper, for the purpose of proving his former marriage with another woman, but he swore directly the reverse; they then called the woman to prove the alleged former marriage. The Court of Quarter Sessions rejected the witness; and the Court of King's Bench determined, that she was not competent to give such evidence. Both Mr. Justice Ashurst and Mr. Justice Grose, the only judges present in Court, were of opinion, that a husband and wife are not permitted, from a principle of public policy, to give any evidence that may even *tend to criminate* each other; that the objection is not confined merely to cases, where they are *directly accused* of a crime; but, even in collateral cases, if their evidence *tends that way*, it shall not be admitted; for although the evidence of the one could not be used against the other on a subsequent trial for the offence, yet it might lead to a criminal charge, and cause the other to be apprehended.

The authorities relied upon, in support of this decision, are a passage from Lord Hale's Pleas of the Crown (1) and the case of *Broughton v. Harpur*. (2) But the former authority goes no farther than this, that the wife is not *compellable* to give any evidence charging the husband with an offence; the passage is "a woman is not bound to be sworn, or to give evidence against another in case of theft, &c., if her husband be concerned, though it be material against another, and not directly against her husband." In the case of *Broughton v. Harpur*, where the plaintiff made title to lands as son and heir of A. B. and C. D. his wife, in right of C. D., and the defendant's case was, that A. B. was married to a former wife then living, Gould J., admitted the woman, to whom A. B. was supposed to be married, to prove the former marriage; but afterwards, as the report states, the same cause being tried upon the same title between the same parties, Lord Holt, C. J., refused to admit the former wife, as witness to prove that fact. The note of the case is very short; and it is not stated for what reason the wife was considered incompetent on the second

(1) 2 H. P. C. 301.

(2) 2 Lord Raym. 752.

trial. The objection against her competency on the first trial was on the ground of interest; and, although at that time this cause of incompetency was not accurately defined, it is now clearly settled, that such an objection could not be supported, and that it was properly overruled on the first trial. These authorities, therefore, it is evident, do not support the case of the *King v. Inhabitants of Cliviger*, to the extent to which that case has gone; they certainly do not lead to the conclusion, that husbands and wives are not permitted to give any evidence, in collateral cases, that has a *tendency to criminate* each other.

The one competent to contradict the other in collateral cases.

The rule laid down in the case of the *King v. Cliviger* was much discussed in a late case, the case of the *King v. Inhabitants of All Saints in Worcester* (1), in which the Court of King's Bench was of opinion, that it had been expressed in terms much too general and undefined. That case was as follows: On an appeal against the removal of Esther Newman, otherwise Esther Willis, to the parish of All Saints, as to her maiden settlement, the respondents called a woman of the name of Ann Willis, for the purpose of proving this fact, namely, that at a certain time she married one G. Willis. The appellants objected to her competency, alleging that they were prepared to prove his marriage with the pauper at a subsequent time. The quarter sessions admitted the evidence of the witness, who proved her marriage with G. W. about fourteen years ago; and cohabitation between this witness and G. W., as man and wife, was proved by other evidence. The respondents then proved, that the pauper gained a settlement in her own right in the appellant parish, and that she had about three years ago married G. W.; and this marriage was proved as well by the pauper herself, as by a witness present at the time of the marriage. The counsel for the appellants contended, that the evidence of Ann Willis ought to be struck out. But the court of quarter sessions overruled the objection, and stated the case for the opinion of the Court of King's Bench. In the course of the argument, which took place on

(1) Easter Term, 1817, May 4, MS. 6 M. & S. 194, S. C.

showing cause against the rule for setting aside the judgment of the court below, the case of the *King v. Cliviger* was brought into discussion. And after much argument the Court of King's Bench was of opinion, in the first place, that the case cited (admitting it to its utmost extent) did not show the evidence to be inadmissible at the time that it was offered; for the wife, did not contradict the husband, as he had not been examined,—she did not by her evidence directly criminate him, as the proceeding related to other matters, and not to any criminal charge against him,—and her evidence could never be used against him, nor be made the groundwork of any future criminal proceeding; the evidence, therefore, was unobjectionable when received, and could not properly be expunged. The Court were further of opinion, that the rule, laid down in the case of the *King v. Cliviger*, was too large and general; that the former wife would have been competent to prove her marriage, though the second marriage had been first proved by the respondents; and that even if the second marriage had been proved by the appellants, still she would be competent, and the respondents in reply might have called her to prove the former marriage; for her evidence did not directly criminate the husband, and never could be used against him, nor could he ever be affected by the judgment of the Court founded upon such evidence.

The cases of the *King v. Cliviger*, and the *King v. All Saints*, *Rex v. Bathwick.* were commented on very fully by Lord Tenterden in the recent case of *Rex v. Bathwick*.<sup>(1)</sup> In this case, which arose upon a parochial settlement, the respondents called a witness of the name of Cook, to prove that he was married to the pauper on a particular day. A witness named Mary Byrne, was then called to prove her own marriage with Cook on a previous day. Lord Tenterden's observations tend so much to the elucidation of the point of the law of evidence under consideration, that it is important to extract them at length as far as they regard the matter in question.

(1) 2 Barn. & Ad. 699. See also *Henman v. Dickinson*, 5 Bing. 183.

"The question arose on the settlement of another woman, considered to be the wife of Cook. Cook was examined, and proved his marriage with this woman; but he was not asked, and did not say, that he had not been previously married to the witness Mary. The witness, Mary, was afterwards called to prove her previous marriage with this person. In deposing to this marriage, she did not contradict any thing that he had said. I notice this fact; but we do not mean to say, that, if she had been called to contradict what he had sworn, she would not, in a case like this, have been a competent witness to do so. It is not necessary to decide that question at present; but it may well be doubted, whether the competency of a witness can depend upon the marshalling of the evidence, or the particular stage of the cause at which the witness may be called. In the present case, however, the witness not having been called to contradict her husband, and her testimony not being inconsistent with the fact to which he had deposed, her incompetence, if it can be established, can be so only upon the authority of the case of the *King v. The Inhabitants of Cliviger* (1). The authority of that case was much shaken by the decision of the case of the *King v. The Inhabitants of All Saints, Worcester*, (2) in which Lord Ellenborough said, 'The objection rests only on the language of the *King v. Cliviger*, that it may tend to criminate him; for it has not an immediate tendency, inasmuch as what she stated could not be used in evidence against him. The passage from Lord Hale (P. C. 301,) has been pressed upon us, where it is said the wife is not bound to give evidence against another in a case of theft, if her husband be concerned, though her evidence be material against another, and not directly against her husband. Admitting the authority of that passage, it assumes that the husband was under the criminal charge; that he was included in the *simul cum aliis*. But if we were to determine, without regard to the form of proceeding, whether the husband was implicated in it or not, that the wife is an incompetent witness as to every fact which may possibly have a tendency to crimi-

(1) 2 T. R. 263.

(2) 6 M. &amp; S. 194.

nate her husband, or which, connected with other facts, may perhaps go to form a link in a complicated chain of evidence against him, such a decision, as I think, would go beyond all bounds; and there is not any authority to sustain it; unless, indeed, what has been laid down, as it seems to me, somewhat too largely, in the *King v. Cliviger* may be supposed to do so.' The decision in the case of the *King v. Cliviger* appears to have been founded on a supposed legal maxim of policy, *viz.* that a wife cannot be a witness to give testimony in any degree to criminate her husband. This will undoubtedly be true in the case of a direct charge and proceeding against him for any offence; but in such a case she cannot be a witness to prove his innocence of the charge. The present case is not a direct charge or proceeding against the husband. It is true, that if the testimony given by both be considered as true, the husband, Cook, has been guilty of the crime of bigamy; but nothing that was said by the wife in this case, nor any decision of the court of session, founded upon her testimony, can hereafter be received in evidence to support an indictment against him for that crime. This is altogether *res inter alios acta*; neither the husband nor the wife has any interest in the decision of the question, and the interest of the parish of Pancras required that the illegality of the second marriage should be established, if it was in fact illegal."

A wife may be a witness, in an action between third persons not immediately affecting the interest of the husband, though her evidence may possibly expose him to a legal demand: as, in an action between third persons for goods sold and delivered, to prove that the goods had been sold not on the credit of the defendant, but on her husband's credit. (1) This evidence, it may be said, was in some measure against the husband, though he was not a party in the suit. On the other hand, it is to be observed, that a person is compellable to give evidence, though it subject himself to a legal demand, and that to reject her evidence in such a case would be a hardship on the defendant, who may have no other means of defending him-

Action between third persons.

(1) *Williams v. Johnson*, by King, C. J., 1 Str. 204. Bull. N. P. 287. S. C.

self against an unjust demand: and though, upon her testimony the defendant might have a verdict, and an action might afterwards in consequence be brought against the husband, she would not then be admitted as a witness, nor could her evidence in the first suit be produced against him.

It would seem, indeed, that the principle of the rule was not infringed upon by requiring a wife, when called as a witness in a suit, in the event of which her husband is not interested, to answer all questions which might be demanded of her husband; but that some violation was done to the principle of the rule of exclusion, when the wife is compelled to prove facts upon which the husband might have declined giving evidence, in consequence of their tendency to criminate himself. It is to be observed, however, that the privilege given to the husband in such a case, is partly, though not entirely, on the ground, that what he says would be admissible evidence against himself, whereas the evidence of his wife could not be used against him.

Conversations  
between hus-  
band and wife,  
how far privi-  
leged.

With respect to the evidence of conversations between husband and wife, it has been decided, that where a man or wife are divorced by act of parliament, a wife is not competent to prove a contract made by her husband previous to the divorce, on the ground that the confidence between man and wife should be kept for ever inviolable. (1) There have been contrary decisions at *nisi prius* as to the point, whether the widow of a deceased person is a competent witness for a defendant, to prove an admission by her husband in an action brought by her husband's executors. (2)

(1) *Monroe v. Twisleton*, by Lord Alvanley, Peake's Add. Ca. 219, and per Lord Ellenborough in *Aveson v. Lord Kinnaird*, 6 East, 192. In *Scholey v. Goodman*, 1 B. 349. The Court of Common Pleas appear to have doubted, whether the declarations of a wife, having a separate maintenance, were admissible to shew that she was living in adultery; see *Hodgkinson v. Fletcher*, ante, 4 Campb. 70.

(2) In *Doker v. Hasler*, Ry. & Mo. 198, by Best, C. J., the evidence was rejected; and see per Lord Ellenborough in the course of the argument in *Aveson v. Lord Kinnaird*, 6 East, 192. In *Beveridge v. Minter*, 1 C. & P. 364, by Lord Tenterden, C. J., the evidence was received. A distinction may, perhaps, be drawn between cases, where the wife is called to prove a conversation to which herself



It is settled, that a wife is incompetent, as well after as Non-access. before the death of her husband, to prove the fact of non-access, that is to say, of the absence of the fact or the opportunity of sexual intercourse with her husband, in whatever form the legal proceeding may be, and whoever may be parties to it. This rule is established, independently of any possible motives of interest in the particular case, upon principles of public policy. (1)

There are several exceptions to the general rule upon this Exceptions. subject, where, from the nature of the inquiry, the information to be expected is peculiarly within the knowledge of the husband or wife, and where to exclude such evidence would occasion insecurity to that relation of society, which it is the object of the rule to protect. It has been before observed, that the authorities for admitting the wife's evidence, in such excepted cases, in favour of her husband, are equally authorities for receiving it, where it operates against him. (2)

A wife is a competent witness against her husband on any charge which affects her liberty or person, (as, a forcible marriage,) although she has voluntarily cohabited with him. (3) A Forcible marriage.

and her husband were the only parties, and other cases in which her evidence might be material against her husband's executors. See also *Humphreys v. Boyle*, 2 M. & M. 140, where a wife's declarations during coverture, were received in a suit brought by her administratrix against the husband.

(1) *R. v. Rooke*, 1 Wils. 340. *R. v. Kea*, 11 East, 132. *R. v. Luffe*, 8 East, 203. In *Goodright v. Moss*, Cowper, 590, Lord Mansfield says, that it is a rule founded in decency, morality, and policy, that husband and wife shall not be allowed to say, after marriage, that they have had no connexion, and therefore, that the offspring is spurious, more especially the mother, who is the offending party. The incompetency of married people to prove non-access, has occasionally been rested on the grounds of necessity or of

interest, which grounds, however, will not support all the authorities. The wife seems to be competent to prove access, where no question of interest is involved; and it would seem, that in such a case, her statements as to non-access might be used to contradict her. See *Pendrell v. Pendrell*, Str. 925, B. N. P. 287.

(2) Per Lord Tenterden, C. J., in *R. v. Sergeant, Ry. & Mo.* 354, by Gibbs, C. J., in *R. v. Perry*, cited *ib.*

(3) Per Hullock, B., *Wakefield's case*, 2 Russ. 606. *Swenden's case*, 4 Howell's St. Tr. 575. *R. v. Perry*, 1794. Hawk. P. C. b. 1, ch. 41, s. 13. The wife was there called for her husband; see this case mentioned by Lord Tenterden, C. J., in *R. v. Sergeant, Ry. & Mo.* 354. *Fulwood's case*, 1 Hale, P. C. 302. 1 Com. 444.

Rape. wife may be a witness on the prosecution of her husband for a rape committed on her person. (1) On an indictment against a man for beating his wife, Lord Raymond suffered her to give evidence. (2)

Malicious shooting. On the trial of an indictment against a man for shooting at his wife, the evidence of the wife was ruled to be admissible against the husband; but Holroyd, J., thought that the wife could only be permitted to prove such facts as could not be proved by any other witness. (3)

Articles of peace. A wife is permitted to exhibit articles of the peace against her husband: (4) and the Court will not receive affidavits on the part of the defendant, to contradict the truth of the articles exhibited against him, and prevent his giving surety. (5) So, an affidavit of a married woman has been admitted to be read, on

The authorities are somewhat contradictory as to the competency of the wife after a voluntary cohabitation. Hawkins says, that it was ruled in *R. v. Perry*, that the wife was a competent witness for or against her husband on a trial of an indictment for a forcible marriage, although she had cohabited with him from the day of the marriage; and in *R. v. Wakefield and others*, Lancaster Spr. Ass. 1827, cited 2 Russell on Crimes, 706, for a conspiracy, in unlawfully taking Ellen Turner, and procuring her to be married, Hullock, B., received the evidence of the wife, as being admissible on the ground of necessity, even supposing that the marriage was valid, and also on the ground that the defendant could not take advantage of his own wrong. There was a second count charging force, which was not supported by the evidence; Hullock, B., observed, that he had seen a report of *R. v. Perry*, from which it appeared, that the wife was held to be a competent witness, though no force was used in the abduction. As to the effect of force in such cases, see further, 1 Comm. 444. 1 Hale, P. C. 302. 4 Mod. 3.

Str. 633. Cro. Car. 488. Ventr. 243. 2 Hawk. c. 46.

(1) Lord Audley's case, 1 St. Tr. 393. 3 Howell's St. Tr. 413. Hutton, 116. 1 Hale, P. C. 301. Hawk. b. 2, c. 46, s. 77. Probyn, J., in Rep. temp. Hard. 83, B. N. P. 287. 1 Bl. Comm. 443. See Grigg's case, Sir T. Raym. 1 Gilb. Ev. 120. 2 Kel. 403. Ca. temp. Hard. 83.

(2) Ayre's case, 1 Str. 633. Lady Lawley's case, B. N. P. 287. Jagger's case, 1 East, P. C. 454. The exception extends to dying declarations, Woodcock's case, 2 Leach, Cr. C. 563. John's case, 1 East, P. C. 357.

(3) Whitehouse's case, by Garrow, B. and Holroyd, J., 2 Russell on Crimes, 606. Mr. J. Holroyd cited the case of Jagger, 1 East, P. C. 454, where a wife was allowed to prove the fact of a poisoned cake having been given her by her husband. See *R. v. Ferrers*, 1 Burr. 635. *R. v. Mead*, 1 Burr. 542. *R. v. Bowes*, 1 T. R. 698.

(4) Bull. N. P. 287.

(5) Lord Vane's case, 2 Str. 1202, more fully stated from Mr. Ford's MS. in 13 East, 171, n. (a.); *R. v. Doherty*, ib. S. P.

an application to the Court of King's Bench for an information against her husband, for an attempt to take her away by force after articles of separation: (1) and it would be strange, says Mr. Justice Buller, to permit her to be a witness to ground a prosecution, and not afterwards to be a witness at the trial. (2)

Upon an appeal against an order of bastardy in the case of a married woman, Lord Hardwicke and the other judges held, that she was a competent witness to prove her criminal connection with the defendant, though her husband was interested both in the question and the event of the appeal; because such a fact, so secret in its nature, can scarce ever be proved by other evidence. (3) And, by a parity of reason, said Lord Ellenborough, in the case of the *King v. Luffe*, (4) it should seem, if she be admitted as a witness of necessity, to speak to the fact of the adulterous intercourse, it might also, perhaps, be competent for her to prove, that the adulterer *alone* had that sort of intercourse with her, by which a child might be produced within the limits of time which nature allows for parturition. But this is only from the necessity of the thing. (5)

(1) *Lady Lawley's case*; Bull. N. P. 287. *Mary Mead's case*, 1 Burr. 543.

(2) Bull. N. P. 287. In the case of *Annesley v. Lord Anglesea*, 17 Howell, 1276, the Court were of opinion, that a wife might give evidence as to her husband's credibility upon oath. See 13 Howell's St. T. 581, as to the words or actions of a wife being evidence against her husband under the circumstances of *Sir T. Fenwick's case*.

(3) *R. v. Reading*, Rep. temp. Hard. 82. See *Cope v. Cope*, M. & R. 276. *R. v. Bedell*, Andr. 8. Gilb. Ev. 139. *R. v. Luffe*, 8 East, 203, *Infra*, chapter on *Presumptions*. In *R. v. Reading*, it was considered that the wife could not establish the whole case, but that additional evidence must be produced of the absence of the husband.

(4) 8 East, 203. In an action on a malicious prosecution, the evidence of a wife given on the trial of the indictment has been received from necessity; that of her husband, though he was the defendant, being received on the same ground. *Johnson v. Browning*, B. N. P. 15. In the Court of Justiciary in Scotland, a wife was admitted as a witness for her husband on a trial for murder, to prove that at the time of the blow given, the deceased was in the act of adultery with her.

(5) In *Cope v. Cope*, M. & R. 276, Mr. J. Alderson directed the jury, that if they were not satisfied that the husband did not avail himself of the opportunity of intercourse, the presumption of legitimacy was not to be rebutted, by its being shewn that other men had also sexual intercourse with the woman. *Vide infra*, *Presumptive Evidence*.

Declarations  
and letters.

The rule in question has no application to cases where the wife, who is not produced as a witness, has acted for the husband in his business and by his authority and consent, and where, by adopting her acts, he is bound by any admission or acknowledgment made by her respecting that business. Cases of this description belong to the doctrine of admissions. (1) To the same doctrine also belong the various cases in which it has been determined, that the letters or declarations of a wife are not admissible either for or against her husband, even where her acts are the cause of the suit, or when she is living separately from him, or when the husband is suing in her right as executrix. (2) The distinctions as to the cases in which the letters or declarations of a wife are properly to be considered in the nature of facts not depending on her credit, will be more properly considered in the chapter treating of hearsay evidence. The evidence of a husband's demeanor, upon hearing statements made by his wife, and which are proved by a third person, also belongs to the same branch of evidence. (3)

Wife of party.

With respect to the question, who is to be considered a wife so as to be rendered an incompetent witness by the rule under consideration, it is settled, that upon an indictment for bigamy, after the proof of the first marriage, the woman subsequently married is a competent witness against the prisoner, although the legality of the first marriage cannot be said to be deter-

(1) *Emerson v. Blonden*, 1 Esp. 142. 1 Str. 527. B. P. N. 287. *Anderson v. Saunderson*, 1 Holt, N. P. C. 591. *White v. Cayler*, 6 T. R. 176. *Clifford v. Burton*, 1 Bing. 199. *Gregory v. Parker*, 1 Campb. 394. *Palethorpe v. Furnish*, 2 Esp. 511, n. 15 Ves. 159. *Hall v. Hall*, 2 Str. 1094, apparently overruled. *Cary v. Adkins*, 4 Campb. 94. Where a wife's declaration as to money of which she had the exclusive custody was received. See *Aveson v. Lord Kinaird*, 6 East, 188. *Humphreys v. Boyle*, 1 M. & Rob. 140, as to declarations of wife concerning a debt due to her *dem sola*.

(2) *Dunn v. White*, 7 T. R. 112. *Kelly v. Small*, 2 Esp. 716. *Hodg-*

*kinson v. Fletcher*, 4 Campb. 70. *Winsmore v. Greenback*, Willes, 577. *Alban v. Bitchell*, 6 T. R. 680. *Barron v. Grillard*, 3 V. & B. 165. *Baker v. Morley*, B. N. P. 28.

(3) Where a wife detailed to a surgeon, in the presence of her husband, the circumstances under which her husband had murdered her child, the evidence was rejected by Garrow, B., in a case tried upon the Midland circuit. But such a case obviously was not affected by the principle of exclusion discussed in the present chapter; the effect of the evidence depended on the fact of the husband's demeanor, upon hearing such a statement by whomsoever made.

mined before the prisoner's conviction. (1) On an appeal against the removal of a woman, as the widow of A. B. deceased, *prima facie* evidence of the marriage having been produced on the part of the respondents, the Court of King's Bench determined, that the woman was a competent witness, on the part of the appellants, to disprove the marriage. (2) Where a witness, produced by the defendant, had lived with the plaintiff as her husband during the time of the transactions, to which he was called to speak, but had ceased to live with her, when her former husband, who had been absent from England upwards of thirty years and was supposed to be dead, returned to England, it was held that there was no objection to her evidence. (3)

Though a person has always held out a woman to the world as his wife, it has been decided, that she is not therefore incompetent to give evidence in any legal proceeding, in the event of which that person is interested. (4)

### SECTION III.

#### THE EXCLUSION OF MATTERS DISCLOSED IN PROFESSIONAL CONFIDENCE.

Communications made on the faith of that professional confidence which a client reposes in his counsel, attorney, or soli- General rule.

(1) 1 Hale P. C. 393. B. N. P. 287. 1 East, P. C. 499, and see *Standen v. Standen*, Peake, 33.

(2) *R. v. Bramley*, 6 T. R. 330. *R. v. St. Peters*, Burr. Sett. Ca. 25. S. P., and see *Wells v. Fisher*, *supra*.

(3) *Wells v. Fisher*, 1 Mo. & Ro. 99. *nom. Wells v. Fletcher*, 5 C. & P. 12. The case appears to have been decided on the ground of absence of bias, which is not the principle on which the objection turns. But where there is not a legal marriage there appears to be no authority for excluding the evidence.

(4) *Batthews v. Galindo*, 4 Bing.

610. The point was considered doubtful in *Campbell v. Twemlow*, 1 Price, 81, and Lord Kenyon ruled, that a prisoner, who had called a woman as his wife, during a trial, was estopped from calling her as a witness upon the same trial. *Ches. Cir. 1782*, cited by Chief Baron Richards, in *Campbell v. Noconlow*, *ubi supra*. See *Adey's case*, *Leach*, 243. *Mace v. Cadell*, *Cowp.* 233. Lord Kenyon's decision is approved of by Park, J., in *Batthews v. Galindo*. It would seem, however, improper to exclude competent testimony in consequence of the misrepresentation of a party.

**Principle.**

citor, are not allowed to be revealed in a court of justice to the prejudice of the client. The expediency of this rule must depend, not on the impropriety of violating the confidence reposed, but on a consideration that the collateral inconvenience which would ensue, if no such confidence were reposed, would preponderate over the direct mischief produced by the chance of misdecision or failure of justice resulting from the want of evidence. If in the cases within the operation of the rule, the only confidence reposed was a confession of guilt or dishonesty, the rule would be obviously detrimental to the interests of justice; but it is conceived, that in a multitude of instances, a person possessed of just rights would be materially impeded in vindicating them, if every communication made to his professional adviser might be used against him; if such were the law, it would be necessary, in self-defence, to accompany all communications made to a professional adviser, with a statement of the several circumstances and explanations, which, however unnecessary for the purpose of the communication, would be requisite to prevent it from being unfairly used. And it is to be observed, that the evidence in question, being generally a species of hearsay evidence, is open to much objection upon that ground, especially as it would generally be delivered either by a very favorable or a very hostile witness.

**Nature of privilege.**

The privilege is that of the client and not of the professional adviser; an attorney will not be allowed, against his client's will, to disclose matters of professional confidence, though himself willing to do so. (1) The client may waive his privilege. (2) But he is not to be considered as waiving it, by calling his attorney as a witness. (3)

With respect to the character and situation of the persons

(1) B. N. P. 284. *Wilson v. Rastall*, 4 T. R. 759. *Sandford v. Kensington*, 2 Ves. Jun. 189.

(2) *Merle v. More*, R. & M. 390. In this case the person waiving the privilege was not a party to the suit.

(3) *Waldron v. Ward*, Styl. 449. *Vaillant v. Dodemead*, 2 Atk. 524. The case decides that he cannot be examined as to confidential communications unconnected with the subject of the questions in chief.

receiving the communications, it is to be observed, that this professional privilege extends to the three cases of counsel, attorney, and solicitor. (1)

Communications to what persons privileged.

A person who acts as interpreter (2) or agent, (3) as the organ of communication between an attorney and his client, stands precisely in the same situation as the attorney himself; he is considered as the organ of the attorney, and is under the same conditions of secrecy. An attorney's clerk (4) cannot be called to prove a confidential communication. A barrister's clerk cannot be called to prove the date of his master's retainer. (5)

But a person, though by profession an attorney, if he be not employed in the particular business which is the subject of inquiry, as where he is undersheriff at the time, is not precluded from giving evidence, though he may have been consulted confidentially. (6) And it has been ruled, that a person who was consulted confidentially, on the supposition of his being an attorney, when, in fact, he was not one, is compellable to answer. (7)

(1) *Wilson v. Rastall*, 4 T. R. 759. *Waldron v. Ward*, Styl. 449. In *Bailie's case*, 21 St. Tr. 358, a witness objected to be examined respecting confidential communications between himself and the opposite party in a cause, at his client's request, where he was called on by his client to disclose them. In *Currey v. Walter*, 1 Esp. 456, it was held to be at the option of a counsel to relate what was stated by him in making a motion before the Court; it would seem that this was not on the ground of confidence, but of the privilege of counsel. It would seem that an arbitrator had the like privilege, not on the ground of confidence, but of protection to his situation, *Ellis v. Soltan*, cited 4 C. & P. 327. *Johnson v. Durant*, *ibid.* *Habershaw v. Treby*, 3 Esp. 38. In *Martin v. Thornton*, 4 Esp. 181, the arbitrator was examined. In *Sparke v. Middleton*, 1 Keb. 505, pl. 68, the counsel for the defendant

was called by the plaintiff and was allowed to take a special oath.

(2) *Du Barre v. Livetti*, Peake, 78, recognized 4 T. R. 756.

(3) *Parkins v. Hawkshaw*, 2 St. 239, whether the privilege extends to the executor of an attorney. See *Fenwick v. Reed*, 1 Mer. 114.

(4) *Taylor v. Foster*, 2 C. & P. 195. *R. v. Upper Boddington*, 8 D. & R. 732.

(5) *Foot v. Hayne*, R. & M. 165.

(6) *Wilson v. Rastall*, 4 T. R. 753. See *Rex v. Brewer*, 6 C. & P. 363. *Hill v. Elliot*, 5 C. & P. 436.

(7) *Fountain v. Young*, 6 Esp. 113. Sir D. Evans, in his edition of Pothier, suggests that it follows from *Wilson v. Rastall*, that communications to a conveyancer are not privileged, when made to him in that capacity, though he may happen to be a counsel or attorney. But in *Farquano v. Knight*, 2 M. & Wel. 100, it was said by Lord Abinger, C. B., that it was no ob-

Medical advisers.

Friends.

Bankers.

Stewards.

The professional privilege is confined to the cases which have been enumerated. (1) There are, indeed, cases, said Mr. Justice Buller, in the case of *Wilson v. Rastall*, to which it is much to be lamented that the law of privilege is not extended; those in which medical persons are obliged to declare the information which they have acquired by attending in their professional characters. (2) This point was much considered in the *Duchess of Kingston's* case, where Sir C. Hawkins, who had attended the duchess as a medical man, was compelled to disclose what had been committed to him in confidence. (3) Lord Kenyon, in the same case of *Wilson v. Rastall*, observed, if a friend could not reveal what was imparted to him in confidence, what is to become of many cases even affecting life, for instance Dr. *Ratcliff's* case: (4) and if the privilege claimed extended to all cases and persons, Lord W. Russell died by the hands of an assassin and not by the hands of the law; for his friend, Lord Howard, was permitted to give evidence of confidential conversations between them. (5)

jection to an attorney's privilege that a document was brought to him in the character of a scrivener, for that Lord Nottingham had laid it down, that he would not compel a scrivener to disclose communications made to him. *Harvey v. Clayton*, 2 Swanst. 221, n. *Ason. Skinn.* 404. In the same case, Parke, B., observed, that it would be difficult to say that a licensed conveyancer was privileged as such.

(1) 4 T. R. 758. *Vaillant v. Dodemead*, 2 Atk. 524. 2 Swanst. 221. *Stone v. Lord G. Lennox*, Lord Chancellor's Cond. West., Nov. 4, 1836. It was formerly thought that a trustee was privileged, B. N. P. 184.

(2) 4 T. R. 759. See also *R. v. Gibbons*, 1 C. & P. 97. *R. v. Sparkes*, cited in *Peake's N. P. C.* 77, *Du Barre v. Levette*. Whether the extension of professional confidence to medical practitioners would be expedient, may admit of considerable question.

(3) 20 Howell's St. Tr. 613, 614.

(4) 18 Howell's St. Tr. 428.

(5) 9 Howell's St. Tr. 599. It may, with great reason, be questioned, whether, taking into consideration all the circumstances of Lord Russell's trial, it is not too much to affirm that he died by the hands of the law.

(6) *Loyd v. Freshfield*, 2 C. & P. 329.



quainted in consequence of his employment. (1) A confession to a clergyman is not privileged. (2)

In a case at *nisi prius*, where a clerk to the commissioners of the property-tax was called to prove the defendant a collector, and refused to give evidence, on the ground of his having taken an oath of office not to disclose what he should learn as clerk respecting the property-tax, except with the consent of the commissioners or by force of an act of parliament, the Court held, that this oath would not exempt the witness, and that it must be construed, as containing an implied exception of the evidence which he might be called to give in courts of justice in obedience to the writ of *subpœna*. (3) In an early case, (4) indeed, where the defendant pleaded, to an action of debt on a bond, the statute against buying and selling of offices, and called a witness to show on what occasion the bond was given, Lord Holt is said to have refused his evidence, because it appeared, that he was privately intrusted to make the bargain, and to keep it secret. But the principle and authority of this case seem to have been over-ruled by that of *Wilson v. Rastall*, and the later decisions on this subject.

Clerk to commissioners.

Oath of office

With respect to the nature of the communications which are  
What communications privileged.

(1) Lord Falmouth *v.* Moss, 11 Price, 455. The question related to the points, whether a steward could be allowed to say, that an ancestor of his employer granted a certain lease, and whether that ancestor, under deeds in his employer's possession, took an estate for life. The Court guarded themselves from deciding whether a steward could be asked general questions as to his employer's title and as to deeds in his possession. That stewards are not privileged, see *Vaillant v. Dodemead*, 2 Atk. 524. Per Buller, J., 4 T. R. 756.

(2) *R. v. Sparkes*, cited in *Du Barre v. Livette*, Peake, 77, the confession was made by a Papist. In *Broad v. Pitt*, 3 C. & P. 519, Lord Wynford said, that it had been

decided in *Gilham's case*, R. & M. Cr. Cas. 194, that the privilege did not extend to clergymen, but that he would never compel a clergyman to disclose communications made to him by a prisoner; but if he chose to disclose them, he should receive them in evidence. He also observed, that the confidence, in the case of attornies, was a great anomaly in the law. A confession to a Popish priest has been held not to be privileged. *Butler v. Moore*, Macnally, 253. In *Du Barre v. Livette*, Peake, 108, Lord Kenyon apparently dissents from the decision in *R. v. Sparkes*. A peer is not privileged, 11 St. Tr. 246.

(3) *Les q. t. v. Birrel*, 3 Campb. 337.

(4) *Bull. N. P.* 284.

where the communication related to the bringing or defending an action. (1)

It should seem that the privilege extends to all cases where a communication is made to an attorney or other legal adviser in his professional capacity; (2) and that the rule is correlative with that which governs the summary jurisdiction of the Courts over attorneys. (3) That rule has been thus laid down: "Where an attorney is employed in a matter wholly unconnected with his professional character, the Court will not interfere in a summary way to compel him to execute faithfully the trust reposed in him. But when the employment is so connected with his professional character, as to afford a presumption that his character formed the ground of his employment by the client, there the Court will exercise this jurisdiction. (4)"

Sale of estate.

It has been held, that communications made between a client and his attorney respecting the sale and purchase of estates are privileged, although no suit be either existing or expected. (5) And where instructions had been given to an attorney for drawing a deed which the attorney refused to draw, and the deed was drawn by another person; the validity of the deed being afterwards questioned on the ground of fraud, in an action against the sheriff, in which the attorney first applied to was not employed, the Court of Common Pleas,

Instructions for  
fraudulent  
deed.

(1) *Ex relatione* Parke, J., in *Moore v. Terrel*, 4 B. & Ad. 876, and in *Doe v. Harris*, 5 C. & P. 593. The authorities for restricting the privilege were *Williams v. Mundie*, R. & M. 34. *Broad v. Vetter*, M. & M. 233. *Duffin v. Smith*, Peake, 108. *Wadsworth v. Hamshaw*, 2 Br. & B. 5, n. The authorities for the more extensive privilege are *Greenough v. Gaskell*, Mylne & Keen, 98. *Bilton v. Corporation of Liverpool*, *ib.* 88. *Moore v. Tyrrell*, 4 B. & Ad. 870. *Doe d. Shellard v. Harris*, 5 C. & P. 594. See 2 Swanst. 199, n.

(2) See *Doe v. Harris*, 5 C. & P. 593. *Walker v. Wildman*, 6 Madd.

47, and cases cited in the last note. *Doe d. Peter v. Watkins*, 3 Bing. P. C. 421.

(3) *Turquano v. Knight*, 2 M. & Wel. 101. Per Alderson, J., the Court adverted to the case of *Greenough v. Gaskell*, 1 Myl. & K. 98, as one in which all the authorities had been reviewed.

(4) *Ex parte Aitken*, 4 B. & Ald. 49. *Ex parte Yeatman*, 4 Dowl. P. C. 309.

(5) *Mynn v. Joliffe*, 1 M. & R. 327. See also a case cited *ib.* tried before Parke, J., and per Richardson, J., in *Cormack v. Heathcote*, 2 Br. & B. 6.

refused a rule *nisi* for a new trial, on the ground that the evidence of the attorney, as to the instructions he had received for drawing the deed, had been rejected. (1) An attorney will not be allowed to make a statement, derived from a knowledge of his client's title, that his client has no power to grant freehold leases. (2) In an action of trover for a lease, brought by the assignees of a bankrupt, it was pleaded, that before the bankruptcy the bankrupt deposited the lease with the defendant as a collateral security; at the trial the plaintiffs endeavoured to shew that the lease was deposited after an act of bankruptcy, and they proposed to ask a witness, who had been the attorney for the bankrupt after the act of bankruptcy, and who had been applied to by him to raise the money, whether the bankrupt had not the lease in his possession at that time, and whether he had not brought it to him for the purpose of raising money upon it. It was held, that the witness could not be allowed to answer the question. (3)

Leasing power.

Possession of deed.

A communication made to a solicitor, if confidential, is privileged, in whatever form made. If it would be privileged, when communicated in words, spoken or written, it will be privileged equally when conveyed by means of sight, instead of words. Thus, an attorney cannot give evidence as to the fact of the destruction of an instrument, which he has been admitted in confidence to see destroyed. (4)

The principle of protection, afforded to professional confidence in regard to communications made by a client, must obviously preclude an attorney from producing or disclosing the contents of deeds or other papers deposited with him confidentially in his professional character. "The names, times, or dates, contained in a written instrument," said Lord Ellenbo-

Production of deeds.

(1) *Cormack v. Heathcote*, 2 Br. & B. 4, and see *Doe dem. Shellard v. Harris*, 5 C. & P. 594. The witness cannot be interrogated, whether the advice was asked for a lawful or unlawful purpose, *ib.* See *Anon. Skinn.* 404, Vin. Ab. (B. a.) pl. 10. For the decisions in equity upon this subject, and as to the production of cases submitted to counsel, and

their opinions upon such cases, see *Hare on Discovery*, Chap. III.

(2) *Moore v. Terrel*, 4 B. & Ad. 878.

(3) *Turquano v. Knight*, 2 M. & Wel. 98. It was stated to be no objection to the privilege, that the lease was brought to the attorney in the character of scrivener.

(4) *Robson v. Kemp*, 5 Esp. 54.

rough, "though not known from the communication of the client, yet they come to the knowledge of the attorney from the delivery of the instrument by his client." (1) If a deed deposited confidentially with an attorney has been obtained out of his hands for the purpose of being produced in evidence by another witness, it cannot be received. Thus, in a case tried before Mr. Justice Bayley, the plaintiff's counsel having proved a certain deed in the possession of the defendant, and the defendant refusing to produce it, though he admitted having received notice, the counsel for the plaintiff offered in evidence a copy of the deed, which had been obtained from one who many years ago acted as attorney for the person under whom the defendant claimed, and who had been intrusted by him with the original deed in his professional character. The counsel, on the part of the defendant, objected that this evidence ought not to be received, as the original deed had been deposited confidentially with the attorney; and Mr. Justice Bayley refused to admit it. He said, "the attorney could not give parole evidence of the contents of the deed which had been intrusted to him; so neither could he furnish a copy. He ought not to have communicated to others what was deposited with him in confidence, whether it was a written or verbal communication. It is the privilege of his client and continues from first to last." (2)

**Rule in prosecutions.**

The obligation of secrecy has been enforced, between attorney and client, even in a case where the interests of criminal justice were concerned. (3) In a prosecution for the forgery of a promissory note, an attorney, who had the note in his possession, refused to produce it before the clerk of arraigns, who required it for the purpose of setting it out in the indictment: upon

(1) *Brand v. Ackerman*, 5 Esp. 119. And see *Bath v. Kinsey*, 1 Cr. M. & R. 42.

(2) *Fisher v. Heming*, Leic. Lent Ass. 1809. See *Bottomley v. Usborne*, Peake's Add. Ca. 101, after a notice to produce. *Cook v. Hearn*, 1 M. & Ro. 201, custody of a rule of Court.

(3) *R. v. Smith*, Derby Sum. Ass. 1822. In support of this decision, see *R. v. Dixon*, 3 Burr. 1687. It would seem, that as in these cases

the notes and papers might have been seized, if they had been delivered back by the attorney to the client, the cases are distinguishable from those in which confessions are made to professional advisers. In the case in the text, and in *R. v. Dixon*, a greater privilege was given to the attorney than would have belonged to the client, and that, in a case where the interests of the state required the production of the evidence.

which, he was summoned to appear before the judge, and show cause why he should not produce the note. He accordingly attended, together with counsel for the prosecution, and counsel for the prisoner. Mr. Justice Holroyd inquired minutely into the circumstances, by which he had the note in his possession; when it appeared, on the statement of the attorney, that he had been consulted by the prisoner on the note in question, and that by his direction he had commenced an action, to recover the amount of the note, against the person in whose name it was now supposed to be forged: that a short time afterwards, he had been summoned before a magistrate, when the prisoner was apprehended on a charge of forgery, and he was then desired to produce the note: upon this, he inquired of the prisoner, who was present, whether he would consent to its being produced: the prisoner consented, asserting his innocence, and the note was accordingly produced. The magistrate, after taking the depositions of witnesses, remarked, that he thought it would be proper to deposit the note in the hands of the high constable: on which the attorney said, that as the note had come into his hands professionally from his client, he expected to have it restored to him, at the same time asking the prisoner, whether he would consent to its being deposited with the high constable, and the prisoner replied, he wished it to be placed in the hands of his attorney. The magistrate returned the note to the attorney, observing, that he would doubtless have notice to produce it at the trial. The attorney (who was not, however, employed professionally for the prisoner in the ensuing trial,) had been *subpœnaed* to produce the note, which was still in his possession; but, before he was *subpœnaed*, a demand of the note had been made upon him by the attorney now employed in the prisoner's defence. On these facts the question was argued by the counsel for the prosecution, and the counsel for the prisoner; and Mr. Justice Holroyd said, he would consider the point. On the following day the subject was again mentioned, when Mr. Justice Holroyd refused to make an order upon the attorney to produce the note, or to give a copy of it, to the clerk of arraigns. A bill, charging the prisoner with forgery, was prepared, and

found by the grand jury. At the trial, the same attorney was called, on the part of the prosecution, for the purpose of producing the note; and, on his re-stating the facts above detailed, the learned Judge declared his opinion, that he ought not to produce it. Secondary evidence of its contents was not offered; the prosecution consequently failed; and the prisoner was acquitted.

Attorney of two persons.

Where a deed or other paper is intrusted to an attorney by two persons, the attorney must, as against strangers, keep it according to the nature of his original employment, and subject to persons by whom he is employed; and therefore, when a vendor the rights of both had a draft of a conveyance made by his own attorney, from which title deeds were afterwards prepared, and the attorney was paid for his business by the vendor and purchaser in moieties by agreement, but the latter employed an attorney on his own part to look over the draft, and the draft remained afterwards with the vendor's attorney; it was held, that such draft was confidentially deposited with the vendor's attorney by the purchaser, as well as by the vendor, and that it could not be produced at the trial against the interest of the purchaser's devisees, though with the consent of the vendor and his attorney. (1) So an attorney, who being resorted to by a borrower to raise money for him peruses, on the part of the proposed lender, the abstracts of the borrower, is not allowed to give evidence concerning them against the borrower. (2) But communications made to an attorney acting as such between two parties, are not privileged from disclosure against either party, each party having a right to such disclosure. (3)

Attorney of stranger to suit.

The protection afforded to professional confidence, applies not only to the professional advisers of the parties to a suit

(1) Doe dem. Stroder v. Seaton, 2 Ad. & Ell. 171.

(2) Doe dem. Peter v. Watkins, 3 Bing. N. C. 421, and see Taylor v. Blacklow, 3 Bing. N. C. 235.

(3) Cleeve v. Powell, 1 M. & Ro. 228. Braughe v. Cradock, 1 M. &

Ro. 182. See Robson v. Kemp, 4 Esp. 235, where the assignees of one of two persons employing an attorney to prepare a deed were not allowed to use the attorney's evidence against the other, alleging fraud.

but also to the professional advisers of strangers to the suit. (1) Though it is convenient to collect the cases respecting professional confidence in the same chapter, the protection afforded to such disclosures, when made by strangers, is founded on principles which are reserved for consideration in the chapter which treats of the examination of witnesses.

Questions of this nature can seldom occur in regard to verbal communications, in consequence of the rule which excludes hearsay evidence. But they have not unfrequently arisen, where an attorney has been called upon to produce the title deeds of a stranger to a suit, which have been confidentially deposited with him. In an action against the sheriff for an escape, it has been held, that the attorney for the original defendant could not be called to prove the debt, where he became acquainted with the business only from the information of his client. (2)

Verbal communications.

The attorney of a stranger to the cause cannot produce a case with the opinion of counsel, which he holds confidentially for his client. (3) On a question of settlement, a mortgagee, a rated inhabitant of the appellant parish, subpoenaed by the respondent parish, was held not compellable to produce the title deeds of the mortgagors; and that he was not at liberty to produce an abstract of the deeds, or to give parol evidence of their contents. (4) In like manner, it has been held, that the solicitor of one of the parties to a deed of composition

Case of opinion.

Title deeds.

(1) *R. v. Withers*, 2 Campb. 578. If the judge improperly receives such evidence, the party to the suit cannot avail himself of the objection. *Marston v. Downes*, 1 Ad. & El. 31. It has been held, that the counsel in the cause have a right to argue the admissibility of the evidence at the trial. *R. v. Woodley*, 1 M. & Ro. 391, *tamen quere*, as the privilege is not allowed out of regard to the interests of the parties to the cause. See, however, *Doe d. Peter v. Watkins*, 3 Bing. N. C. 421.

(2) *Keman v. Sheriff of London*, 2 Esp. 696, and see *Merle v. Moore*, R. & M. 390. *Bowman v. Norton*,

5 C. & P. 177, communications by a bankrupt to his attorney. *Turquano v. Knight*, 2 M. & Wel. 98, *supra*.

(3) *R. v. Woodley*, 1 M. & Ro. 390. See *Ditcher v. Kendrick*, 1 C. & P. 161. It does not appear whether, in this case, the deed was a document of title. It would seem that the attorney's privilege was not more extensive than that of his client; and in *Doe v. Thomas*, 9 B. & C. 288, it seems to have been considered that the privilege was confined to documents of title.

(4) *R. v. Upper Boddington*, 8 D. & R. 726.

is not compellable to produce it in an action between strangers. (1)

But where, by an order of the Court of Chancery, made in a suit depending between a lessor and a lessee, a lease was deposited in the hands of the lessor's attorney, the lessee being at liberty to inspect the same, it was held, in an action of ejectment brought by the lessee against the tenant in possession, that the attorney of the lessor was bound to produce the lease, it not being part of the lessor's title. (2)

Inspection by  
court.

Where an attorney is called upon to produce deeds or papers belonging to his client, who is not a party to the suit, the Court will inspect the documents, and pronounce upon their admissibility, according as their production may appear to be prejudicial or not to the client; in like manner, as where a witness objects to the production of his own title deeds. (3) And, notwithstanding some conflicting opinions, the same rule appears to be held in respect of proceedings or documents in the custody of solicitors for assignees of bankrupts. (4)

Bankruptcy  
proceedings.

Communica-  
tions not pri-  
vileged.

The attorney of a party in the cause may be examined, like any other witness, as to any collateral fact with which he has become acquainted, otherwise than from a disclosure or confession by his client. Thus, if he is the subscribing witness to a deed, he may be examined concerning its execution. (5)

(1) *Harris v. Hill*, 3 Str. 140. As to the admissibility of secondary evidence in such cases, see *infra*, part 2, on the proof of deeds.

(2) *Doe d. Courtail v. Thomas*, 9 B. & C. 288.

(3) *Copeland v. Watts*, 1 Str. 95. *Hawkins v. Howard*, R. & M. 64.

(4) See *Laing v. Barclay*, 3 Str. 38. *Hawkins v. Howard*, R. & M. 64. *Bateson v. Hartsink*, 4 Esp. 43. *Pearson v. Fletcher*, 5 Esp. 9. *Corsen v. Dubois*, Holt, 239. *Cohen v. Templar*, 2 Str. 260. *Nixon v. Mayoh*, 1 M. & R. 76. In *Laing v. Barclay*, *supra*, the solicitor for the commission was held not to be bound to produce the proceedings,

apparently on the ground that their production might prejudice another cause which was pending. The objection was supported by the counsel for the defendants. In *Hawkins v. Howard*, *supra*, the solicitor was bound to produce the proceedings, as the assignees would not be affected by the verdict, and there was but a possibility of their being prejudiced. In *Pearson v. Fletcher*, *supra*, Lord Ellenborough considered the production of bankruptcy proceedings a matter of public duty.

(5) *Doe dem. Jupp v. Andrews*, Cowp. 846. *Robson v. Kemp*, 4 Esp. 235. 5 Esp. 53.



If there be a question about an erasure in a deed or will, he may be asked, whether he had ever seen the instrument in any other state. (1) If an attorney were present when his client was sworn to an answer in Chancery, he might be a witness, on an indictment for perjury, to prove the fact of taking the oath, which is not a fact peculiarly within his knowledge as an attorney, and not communicated to him in secrecy. (2) So the attorney of one of the parties may be examined as to the contents of a written notice, which had been received by him in the course of the cause, requiring him to produce papers. (3) On the same principle, and with the like qualification, an attorney was admitted by Lord Kenyon, in an action of debt upon a bond, to prove that the bond had been given on an usurious consideration. (4)

An attorney conducting a cause in Court may be called as a witness by the opposite side, and asked as to his employer, in order to shew the real party, and let in his declarations. (5) He may be called to prove the identity of the defendants to a suit, though he knows nothing of them, but from his intercourse with them professionally; (6) he may prove that his client is in the possession of a particular document, so as to let in secondary evidence of its contents (7); and he may prove his client's hand-writing. (8)

But it seems, that cases of the above description must be understood with a limitation, that the privilege extends to all knowledge that the attorney obtains, which he would not have obtained, but from his being consulted professionally by his client. And it has accordingly been held, that an attorney is not compellable to state, whether a document shewn to him by his client, in the course of a professional interview, was in

(1) B. N. P. 284. 1 Ventr. 197.

(2) B. N. P. 284. By Lord Mansfield, C. J., in Cowper, 846.

(3) Spenceley v. Schullenberg, 7 East, 357.

(4) Duffin v. Smith, Peake, 108.

(5) Levy v. Pope, M. & M. 416.

(6) Studdy v. Sanders, 3 D. & R. 347. For other examples see

Beckwith v. Bonner, 6 C. & P.

681. Hurd v. Maring, 1 C. & P.

372. Eike v. Nokes, M. & M.

303. R. v. Watkinson, 2 Str.

1122, with the *quere* of the Reporter.

(7) Bevan v. Waters, M. & M. 235.

(8) 2 Hawk. ch. 46, s. 89.

the same state as when produced on the trial, as, for example, whether it was stamped or not. (1)

It is obvious, that communications by an attorney to the opposite party or to strangers, and communications between a plaintiff and defendant, in the presence of an attorney, do not fall within the principle or terms of the rule, which protects private communications between parties and their professional advisers. (2) The rule is also inapplicable to admissions or proposals of compromise made by counsel or attorneys; these will be considered afterwards, in that part of the Work which treats of admissions by agents.

Communications made by a client to his attorney, not for the purpose of asking his legal advice, but to obtain information concerning a matter of fact, (as, whether he could safely attend a meeting of creditors, depending on the fact, whether any arrangements had been made to prevent his arrest,) are not privileged. "A question for legal advice," said Lord Tenterden, "may come within the description of a confidential communication, because it is part of the attorney's duty, as attorney, to give legal advice; but a question for information as to matter of fact, regarding a communication which the attorney has made to others, where the communication might have been made by any other person as well as an attorney, and when the character and office of an attorney has not been called into

(1) *Wheatley v. Williams*, 1 M. & W. 533. It was said that the case in B. N. P. 284, must apply to a case where the attorney has his knowledge independently of any communication from his client; and that if a document be exhibited in pursuance of a confidential consultation, all that appears on the face of the document is a part of the communication.

(2) See *Gainford v. Grammar*, 2 Campb. 10. It seems to have been considered in that case, that although a communication between the defendant's attorney and the plaintiff could be proved by a third person, and that the defendant's

authority to make the communication would be presumed, yet that the attorney himself could not prove the communication; there seems, however, no reason for excluding the attorney's evidence; and in subsequent cases under similar circumstances, the attorney has been examined. See *Ripon v. Davies*, 2 N. & M. 310. *Griffith v. Davies*, 5 B. & Ad. 502. *Turner v. Railton*, 2 Esp. 474. A letter written by an attorney to his client, and produced with the client's signature indorsed, is treated as the letter of the client, *Meyer v. Sefton*, 2 Str. 274.

action, has never been held within the protection, and is not within the principle upon which the privilege is founded." (1)

## SECTION IV.

*The Exclusion of Matters of Evidence, the disclosure of which would be prejudicial to Public Interests.*

The discovery of truth, in inquiries necessary for the administration of criminal justice, and also where the rights of private individuals are concerned, is an object, which, however desirable in itself, may nevertheless be counterbalanced by mischiefs, arising from disclosures which would be prejudicial to public interests. Hence the danger of such disclosures has been deemed, in particular instances, an adequate ground for the rejection of evidence. It will, however, be found, that in most of the cases where testimony has been rejected for this cause, though some particular facts have been excluded from the view of the jury, a sufficient quantity of unimpeachable evidence has been preserved to enable them to arrive at a satisfactory conclusion upon the case.

Principle of exclusion.

On the trial of Hardy for high treason, a man who had been employed by an officer of the executive government, to collect information at a meeting of one of the corresponding societies, was not allowed to disclose the name of his employer, or the nature of the connection that had subsisted between himself and the officer. (2)

Communication of spies.

Another witness, in the course of the same trial, had made reports, from time to time, of the proceedings of some corresponding societies, and had made these reports by the advice of a third person, and under the impression, that the information

Agent of police.

(1) *Bramwick v. Lucas*, 2 B. & C. 744.

(2) 24 *Howell's St. Tr.* 753, on cross-examination of Groves. The same principle was acted upon in the prosecution of Horne Tooke for

high treason; in the prosecution of Walker and others for a conspiracy; and in the prosecution of Watson for high treason. *Gurney's Report*, 159. See also 32 *Howell's St. Tr.* 100.

contained in the reports would be transmitted to another quarter for the purpose of disclosure ; this witness was asked, whether he had communicated his reports to a magistrate of any description (1) ; Lord Chief Justice Eyre considered this a proper question ; the witness, on answering in the negative, was then asked, to whom he had made the communication. This question was objected to ; Lord Chief Justice Eyre upon this said, " It is perfectly right, that all opportunities should be given, to discuss the truth of the evidence given against a prisoner ; but there is a rule, which has universally obtained, on account of its importance to the public for the detection of crimes, that those persons, who are the channel by means of which that detection is made, should not be unnecessarily disclosed. If it can be made appear, that it is necessary to the investigation of the truth of the case, that the name of the person should be disclosed, I should be very unwilling to stop it ; but it does not appear to me, that it is within the ordinary course to do it, or that there is any necessity for it in this particular case."

The cross-examination of the same witness then proceeded, and the witness admitted, that he had related what he knew to a friend, who advised him to communicate his reports of the proceedings to another person. He was then asked, whether that friend was a magistrate ; this he answered in the negative : then came the question, who was the friend ? This was objected to (2) ; and the objection was, that the person, by whose advice the information was given to a person standing in the situation of magistrate, was, to all intents and purposes, the informer, and that his name, therefore, could not be disclosed. (3) The Judges differed in opinion upon this point ; the Lord Chief Baron Macdonald and Mr. Justice Buller were of opinion, that the question was proper : but the majority of the Court, consisting of the Lord Chief Justice Eyre, Mr. Baron Hotham, and Mr. Justice Grose, were of the opposite opinion. Lord Chief Justice Eyre said, " Those questions, which tend to the dis-

(1) 24 Howell's St. Tr. 808 ; on the cross-examination of Lynam.

(2) 24 Howell's St. Tr. p. 811.  
(3) 24 Howell's St. Tr. p. 814.

covery of the channels, by whom the disclosure was made to the officers of justice, are not permitted to be asked. Such matters cannot be disclosed, upon the general principle of the convenience of public justice. All persons in that situation are protected from discovery. It is no more competent to ask who the person was that advised the witness to make the disclosure, than it is to ask to whom he made the disclosure in consequence of that advice, or than it is to ask any other question respecting the channel of information, or what was done under it." Mr. Justice Grose considered the adviser of the witness to be substantially in the situation of an informer, and that his name, therefore, ought not to be revealed. Mr. Baron Hotham also considered the person to be an informer; the witness, he said, had made the communication to his friend, under an impression and full persuasion, that through him the intelligence might be conveyed to a magistrate; and there was no distinction, he added, between making a disclosure to the magistrate himself, or making it to another person, who was to communicate it to the magistrate. The Judges, who were of opinion that the question might properly be asked, admitted the general rule, and differed only in the application of that rule to the particular facts of the case. The Lord Chief Baron said, if he were satisfied that the friend to whom the witness disclosed this matter was in any way a link in the communication, he should certainly agree that the rule applied to him; but this person not being connected either with the magistracy, or the executive government, the case did not appear to him to fall within the rule. Mr. Justice Buller admitted the rule with respect to the informer to the utmost extent: "if the name of the informer," he said, "were to be disclosed, no man would make a discovery, and public justice would be defeated." He admitted, also, that if a middle man is made the channel of communication, he ought to receive the same protection as the first person to whom it was mentioned. But he differed in opinion only as to the situation of the friend respecting which this question arose: in his view of the evidence, he considered that the witness had communicated the information to another man, not for the purpose of prevailing on him to make the disclosure to a

magistrate, but merely to consult him for the purpose of making up his own mind, whether he should himself make the discovery; he was, therefore, of opinion that the witness ought to be allowed to answer the question."

Hence it appears, that a witness who has been employed to collect information for the use of government, or for the purposes of the police, will not be permitted to disclose the name of his employer, or the nature of the connection between that employer and himself, or the name of any person to whom he may have conveyed the information for the purpose of being transmitted. And as it would not be proper to inquire to what officer of government the information had been given, so neither can it be asked, whether the information has been made by that officer to the government. But it seems proper to ask a witness, who is a spy or informer, whether his communications have been made to a magistrate. (1)

Officer of Government.

Upon the trial of Watson for high treason, a clerk of the works in the Ordnance department, who had resided many years in the Tower of London, was called, on the part of the prosecution, to prove that a plan produced was part of the interior of the Tower. He was afterwards asked, upon cross-examination, whether another printed plan, which was shewn to him, was a correct plan of the Tower, for the purpose of proving that such maps might be purchased without difficulty in the shops of London. But the Court held, that the evidence could not be received, on the ground that it would be attended with public mischief to allow an officer of the Tower to be examined as to the accuracy of such a plan. (2)

Official communications.

On a like principle of public policy, official communications between the governor and law-officer of a colony respecting

(1) *Vide* cases *supra*, and *R. v. Watson*, 2 Str. 136, where a witness was not permitted to say whether he delivered a short-hand note to the under-secretary of state. *R. v. Stone*, cited by Lord Ellenbo-

rough, in *R. v. Watson*, 2 Str. 136. 32 Howell's Str. Tr. 101. Another example may be seen in *De Berenger's case*, p. 344 of Gurney's Report.

(2) *R. v. Watson*, 2 Str. 148.

the state of the colony; (1) orders given by the governor of a colony to a military officer; (2) a correspondence between an agent of government and a secretary of state; (3) the report of a military court of inquiry respecting an officer whose conduct the Court had been appointed to examine; (4) the official correspondence between the commissioners and an officer of the customs; (5) a letter from a secretary of state to a person acting under his authority; (6) all these are confidential and privileged communications, which courts of justice will not allow to be disclosed. (7)

In the case of *Plunket v. Cobbett*, (8) (which was an action against the defendant for publishing a libel reflecting on the conduct of the plaintiff, as a member of the Commons' House of Parliament in Ireland,) the council for the defendant inquired of one of the witnesses, the Speaker of the House of Commons, in cross-examination, as to the expressions and arguments, which the plaintiff had used in Parliament on a particular subject, when Lord Ellenborough interposed, and stopped the examination, observing, that it would be a breach of duty in the witness, as a member of the Irish Parliament, and a breach of his oath, to reveal the councils of the nation.

Member of  
parliament.

It does not appear to be completely settled, whether a grand

Grand jury-  
man.

(1) *Wyatt v. Gore*, Holt's N. P. C. 299.

(2) *Cooke v. Maxwell*, 2 Str. 183.

(3) *Anderson v. Sir W. Hamilton*, 2 Br. & B. 156, n.

(4) *Horne v. Lord T. Bentick*, 2 Br. & B. 130. See *q. t. v. Birrell*, 3 Camp. 335.

(5) *Black v. Holmes*, Fox & Smith's Rep. 28, K. B. in Ireland.

(6) Case cited 2 Str. 185. As to minutes taken before the Privy Council, see *Layer's case*, 6 T. R. 281.

(7) When such communications are in writing, the effect of rejecting the document is to let in secondary evidence, in like manner as to title deeds withheld. This point belongs more particularly to the

subject of secondary evidence.

(8) 29 Howell's St. Tr. 71, 72. See *Plunket v. Cobbett*, 5 Esp. 137, from which it would appear that the witness might be asked whether a particular person took part in the debates; a doctrine which is somewhat questionable. And from this report, the disclosure of what the member said, appears to have been left optional with the witness. Except in cases where strangers are excluded, there does not seem to be much weight in the ground stated by Lord Ellenborough. If the disclosure is optional, the privilege must be regarded as that of the witness, and the case would then resemble those of counsel and arbitrators before mentioned.

Witness before  
grand jury.

jury-man is at liberty to disclose the evidence laid before the grand-jury in the course of a criminal proceeding. In an action on the case, for maliciously indicting the plaintiff, Lord Kenyon is reported to have allowed the counsel for the plaintiff to inquire of a grand jury-man, whether the defendant was prosecutor of the indictment; being of opinion, that this inquiry did not infringe upon the official oath taken by the witness. (1)

On the trial of Watson for high treason, a witness was questioned by the counsel for the prisoner as to his having produced and read a certain writing before the grand-jury: this being objected to by the solicitor-general, Lord Ellenborough, C. J., said "he had considerable doubt upon the subject: he remembered a case, in which a witness was questioned as to what passed before the grand jury, and, though it was a matter of considerable importance, he was permitted to answer." The Solicitor-general then intimating, that if such a case had not occurred, he should have thought that what passed before the grand jury could not properly be inquired into, as they are sworn to secrecy." Lord Ellenborough added, that "he had doubts, and that many very eminent men at the bar had entertained doubts upon the point; but that he remembered the case perfectly." (2) Here the matter seems to have dropped; and the question, as originally put, was not repeated.

Private communications to  
official persons.

But communications, though made to official persons, are not privileged, where they are not made in the discharge of any public duty. Thus, a letter written by a private individual to the Secretary of the Postmaster-General, complaining of the conduct of the guard of a mail, has been held not to be within the principle of the rule justifying the exclusion of evidence. (3)

(1) *Sykes v. Dunbar*, 2 Selw. N. P. MSS. The only part of the oath which can be supposed to be a bar to disclosure is the following: "the king's counsel, your fellows', and your own, you shall keep secret."

(2) 32 Howell's St. Tr. 107. And

see the discussion in *Sir J. Fenwick's case*, 5 Harg. St. Tr. 72. In a case cited 12 Vin. Ab. Ev. Ba. 5, the evidence of the clerk of the grand jury was rejected.

(3) *Blake v. Pilfield*, 1 M. & Ro. 198.



When the purposes of public justice require that certain evidence should be given, which the Court from regard to decency would be disposed to suppress, (whether upon indictments for crimes, or on questions of private rights or private wrongs,) the evidence, however inconvenient, must be disclosed. It has therefore been considered, that Mr. Justice Burnet was wrong in refusing to try an action of defamation, in which a woman charged a man with proclaiming to the world that she had a secret defect in her person, and the defendant by plea justified, that it was true she had such defect. (1)

It was said by Lord Mansfield, in *Goodright v. Moss*, (2) Non-access. that it is a rule founded in decency, morality, and policy, that a husband or wife shall not be permitted to say, after marriage, that they have had no connection, and therefore, that the offspring is spurious; more especially the mother, who is the offending party, and that the point had been solemnly decided at the Delegates.

(1) Per Lord Mansfield in *Da Costa v. Jones*, Cowper, 733. But the Courts have frequently refused to try wagers, on the ground of their leading to admission of indecent evidence, or as unnecessarily injuring the feelings of third parties. *Ib.* *Ditchburn v. Goldsmith*, 4 Camb. 152.

(2) Cowper, 594. See *Cope v. Cope*, 1 M. & Ro. 274. In B. N. p. 113, a case is referred to, as shewing that the wife might be examined after her husband's

death, to prove the child a bastard which is inconsistent with the principle adopted by Lord Mansfield. Lord Hardwicke, Rep. temp. Hard. 83, puts the incompetency of the wife to give evidence of non-access upon the ground of interest; a ground which would only apply in particular instances, as in orders of filiation. It does not appear clearly, how the circumstance of the wife being the offending party can affect the question.

## CHAPTER XII.

### GENERAL RULES RELATING TO THE EXCLUSION OF EVIDENCE. HEARSAY EVIDENCE.

**H**AVING investigated several rules for the exclusion of evidence, as regarding the peculiar character or situation of a witness, or the peculiar subject of his testimony, we proceed to consider some rules of a more general nature which have been established, principally with a view to provide against the danger of juries being perplexed or misled by evidence, of doubtful credibility even where the witnesses are unimpeached.

It is proposed to treat of the rules adopted by our Courts, for the exclusion of hearsay evidence, and of secondary evidence.

In treating of hearsay evidence, it is proposed, in the first section of the present chapter, to consider the distinction between original and hearsay evidence; and, in the second section, to treat of the rule which excludes hearsay evidence. Exceptions to this rule will be considered in separate chapters.

#### SECTION I.

##### *Original and Hearsay Evidence.*

When a witness, in the course of stating what has come under the cognizance of his own senses, relative to a matter in dispute, states the language of others which he has heard, or produces papers, which he identifies as being written by parti-

cular individuals, he offers what is called *hearsay* evidence. This evidence may sometimes be the very matter in dispute, or something from which a pertinent inference, relative to the matter in dispute, may be drawn; or, on the other hand, it may consist of a verbal or written narrative of facts received by the witness from some other person, which he delivers at second hand, to the Court. The term, *hearsay* evidence, is used with reference both to that which is written, and to that which is spoken. But, in its legal sense, it is confined to that kind of evidence, which does not derive its effect solely from the credit to be attached to the witness himself, but rests also in part on the veracity and competency of some other person, from whom the witness may have received his information.

In some cases, the words or writings offered in evidence are, in fact, transactions, concerning which the only inquiry instituted is, whether they have taken place or not. For example, letters written to a bankrupt before his bankruptcy, containing matters material to an act of bankruptcy, are admissible, without calling the writer of them, as evidence against the bankrupt, that he received intimation of certain facts; but not to prove, that the facts were true. (1) So letters written to a person a short time previous to his bankruptcy, and containing a refusal to advance money, are evidence of the fact of such refusal. (2)

Transactions  
by word or  
writing.

In like manner, in an action for a malicious prosecution, a letter and an affidavit were received in evidence, not as proving the facts therein stated, but as proving some collateral fact, to be inferred from them; the first, as showing how the

(1) *Cotton v. James*, 1 M. & M. 273. The time of receiving information being important, this was proved by the post-mark.

(2) *Vacher v. Cocks*, 1 M. & M. 353. Lord Tenterden suffered only that part of the letter to be read, which contained the refusal. In *Fairlie v. Denton*, 2 C. & P. 103, the part of a plaintiff's unanswered letter, which contained a demand, was allowed to be read.

It is, however, an established rule, that letters, which are admissible for one purpose, will not be rejected, merely because they contain hearsay evidence of the truth of facts; but the jury will be directed in the proper use of them as instruments of evidence. *Willis v. Bernard*, 8 Bing. 376, and cases *ib.* For other instances of letters, see *Whitaker v. Bank of England*, 6 C. & P. 700; *Whitehead v. Scott*, 1 M. & Ro. 2.

plaintiff came to be bailed; the latter, as showing a step taken by the persons conducting the prosecution. The evidence, as Lord Tenterden observed, was admissible for one purpose, but not for another. (1) In an action for a libel, evidence, that the publisher of the libel followed it up by a charge, the particulars of which corresponded with the imputation in the libel, is admissible on the part of the defendant, though obviously the proof of the particulars of the charge tends in no degree to establish their truth. (2)

Letters to  
testator.

It has been doubted, whether, upon a question of the sanity of a devisor, letters found among his papers shortly after his death, written to him by persons of his acquaintance, are admissible for the purpose, showing that the devisor was treated by them as a person of sound mind (3).

also denial.

Proof of a false denial of a person, by a wife or servant, the person being at home at the time, is original evidence. Nothing could be added to the credibility of the fact of the denial, by calling the person who made it, even supposing that the witness were perfectly disinterested; and although the jury may draw an inference from the fact of the denial, yet they are not required to attach credit to the statement of any person not before them (4). And, clearly, all verbal instructions, as of a bankrupt ordering himself to be denied to creditors, are in their nature original evidence (5). The same is to be said

Directions.

(1) *Taylor v. Williams*, 2 B. & Ad. 845. In *Penn v. Scholey*, 5 Esp. 243, an affidavit made by a stranger, was read in evidence.

(2) *Finden v. Westlake*, 1 M. & M. 561.

(3) *Wright v. Doe d. Tatham*, in Error, 1 Ad. & Ell. 3. One of the letters purported to be an answer. All the writers, except one, were dead. Similar evidence appears to have been received in the Ecclesiastical Courts. *Ib.* p. 8. *Batsford v. Alderson*, 3 Hagg. 609.

(4) *Attorney General v. Good, M'Clel. & Y.* 286; information for custom-house penalties. The husband was denied by the wife,

immediately after uncustomed goods were discovered on the husband's premises. In *Key*, assignee of *Sherwin v. Shaw*, 8 Bing. 320. Upon a creditor calling, the bankrupt was seen peeping over his wife's shoulder in a retired part of the shop, and immediately afterwards she came into the front part, and said, "My husband is not at home." See also *Charington v. Brown*, 1 B. Moore, 341; the answer of a wife to a creditor.

(5) *Jameson v. Eamer*, 1 Esp. 281. *Gillingham v. Laing*, 6 Taunt. 532; directions by a bankrupt to a friend, to say that he was not upon exchange. *Fisher v.*

of communications of various kinds, where the object of giving them in evidence is not that their truth may be inferred solely from the fact of the communication having been made, and from the credit of the person making it (1).

In many cases, the expressions of persons are the very matter in issue: as where the controversy is respecting the question, whether they have been used or not. The proof, therefore, of their having been used, is in its nature original evidence. Thus, upon an inquiry respecting reputed ownership under the bankrupt laws, hearsay evidence of the opinion of neighbours is admissible, either to prove or disprove the reputed ownership of the bankrupt. In one case, Gibbs, C. J., observes, "What is reputed ownership? it is made up of the opinions of a man's neighbours; it is a number of voices concurring upon one or other of two facts (2)." The existence of a public rumour has been allowed to be proved in the same way (3). And this is the nature of the evidence respecting general character, which, it will be seen in the course of this work, is relevant to various inquiries. (4)

Subject of expressions in issue.

Reputed ownership.

Rumor.

Character.

Boucher, 10 Barn. & Cress. 710. Vincent v. Prater, 4 Taunt. 603, where the direction shewed that there was no intention to delay creditors.

(1) Shott v. Streathfield and Another, 2 M. & M. 9. In this case A. went out of partnership, and introduced B. (a defendant) to the witness as his successor; the witness was asked whether, (in the absence of the defendants) he reported this conversation to the plaintiffs. In Whitehead v. Scott, 2 M. & M. 2, it was held, that a party to a suit has a right to have a letter read making a demand, though the counsel for the other party offers to admit the demand.

(2) Grove v. Rutten, Holt's N. P. C. 327. Oliver v. Bartlet, 1 Br. & B. 269. 2 B. Moore, 592. S. C., in which case the court said, that they did not decide, whether reputation alone, without facts, would suffice. And see the cases as to notoriety

of transfer upon assignments of property. Muller v. Moss, 1 M. & S. 335.

(3) Jones v. Perry, 2 Esp. 482; action for keeping a malicious dog, by which the plaintiff's child was bitten. Lord Kenyon allowed a witness to be asked respecting a report in the neighbourhood, that the dog had been bitten by another dog.

(4) See *infra*, respecting relevancy of proofs. Foulkes v. Gellway, 3 Esp. 236, is a strong example of this kind of evidence. It was an action for breach of promise of marriage, where the defence was, that the plaintiff was a woman of bad character; and a witness, who had gone to the place where the plaintiff lived, was allowed to give evidence of what he there heard. Lord Holt, upon an information against a defendant for being a cheat and impostor, allowed declarations of persons as to

General  
opinion.

In like manner, in an action for destroying a picture, where the subject of inquiry was as to the impression produced by the picture on the minds of the public, the declarations of spectators in looking at it were admitted in evidence (1); what was said by the spectators was the effect produced by the picture; it was not received as evidence of the painter's design, upon credit given to assertions of persons not before the Court.

Intention of  
testator.

The declarations of a testator have been held to be receivable in evidence, to shew his intentions, when his will is impugned on the grounds of either fraud, circumvention, or forgery, (2) or to shew the state of his mind. (3)

Expressions  
accompanying  
mental feelings.

In cases where it is material to inquire into the demeanor, the conduct, and mental feelings of an individual at a particular period, the expressions used by the individual at the period in question are, in their nature, original evidence. For they are the thing itself which is inquired into, as far as outward behaviour is important; and as evidence of inward sentiments, they are unlike a statement of past occurrences; for they derive their credit from being usually identified with, and naturally resulting from, particular corresponding feelings.

Letters of wife.

Accordingly, in actions for criminal conversation, where it is material to inquire into the terms, upon which the husband and wife lived together before the connection of the wife with the defendant, it is usual to give evidence of what the husband and wife have said to each other, in order to shew their demeanor and conduct, and whether they were living upon better or worse terms. (4) With the same object, evidence has been given of

having been deceived by him to be given in evidence, *Hathaway's case*; a decision which could not be supported in the present day.

(1) *Du Bost v. Beresford*, 2 Campb. 512. The defence was, that the picture (of Beauty and the Beast) was a libel, inasmuch as the public generally understood who the individuals meant to be portrayed were, by looking at the picture.

(2) *Ellis v. Hardy*, 1 M. & Ro. 525.

(3) *Doe dem. Reed v. Harris*,

7 C. & P. 350. A testator's declaration may be in the nature of original evidence, where they are adduced for the purpose of designating the object of his bounty, or the subject of a bequest, as distinguished from evidence of his intentions.

(4) Per Lord Ellenborough, C. J., in *Trelawney v. Coleman*, 1 B. & A. 90. Per Holroyd, J., 2 Stark. C. 192, stated to be so ruled by Lord Kenyon, 4 Esp. 39. In *Jones v. Thompson*, 6 C. & P. 415, the witness was asked, whether the wife

the anxiety expressed by the wife about her husband, and of her mode of speaking of him in his absence. (1) On the other hand, it is admissible to give general evidence in reduction of damages, that the wife had complained of her husband's treatment. (2) The letters of the wife to the husband, (3) or, as it has been recently decided, the letters of the wife to a third person with reference to her husband, are evidence to shew what her feelings were towards him. (4) In such cases the jury do not substitute the knowledge of an absent person for their own, but they reason as from an effect to a cause.

It is, however, always required, that proof should be given that the declarations or letters of a wife, purporting to express her feelings, were of a time antecedent to the date of any facts calculated to raise suspicion of a criminal intercourse, and when there existed no ground for imputing collusion (5). It has been held, that the letters of the wife are inadmissible, if written after an attempt to commit adultery by the defendant. (6)

Absence of  
collusion.

The expressions of a person afflicted with bodily pain

Expressions ac-  
companying  
bodily feelings.

kept a journal, and for what purpose. The evidence, it has been thought, ought to be general, see *Winter v. Wroot*, 1 M. & Ro. 404.

(1) *Trelawney v. Coleman*, 2 Stark. C. 191. It was held in this case, that the judgment which the witness had formed from the wife's anxiety, was admissible.

(2) *Winter v. Wroot*, 1 M. & Ro. 404.

(3) *Trelawney v. Coleman*, 1 B. & Ald. 90, where there was no direct evidence given of the cause of the parties living separate. *Edwards v. Crook*, 4 Esp. C. 39.

(4) *Willis v. Bernard*, 8 Bing. 376, where it was said, that the letter was less open to exception than if written to the husband. The letter shewed the wife's affection, and also that she was not dissatisfied at being left abroad. The letter also contained a statement of facts, as to which, though the whole letter was read, it was

not evidence. Letters written to the defendant, before the criminal facts are proved to have been committed, are receivable. *Elsam v. Faucett*, 2 Esp. 562. That the letters of the wife are not in general evidence for the defendant, see *B. N. P.* 28.

(5) *Edwards v. Crook*, 4 Esp. 39, where the letters were refused on this ground. *Trelawney v. Coleman*, 1 B. & Ald. 90. *Houliston v. Smith*, 2 C. & P. 24, where it was held that the dates of the letters were not sufficient evidence of the time when they were written. In *Trelawney v. Coleman*, 2 Stark. 191, the period at which the letter in question was written, was proved by a person to whom the wife read the contents. In other cases, the postmark has afforded the requisite proof.

(6) *Wilton v. Webster*, 7 C. & P. 198.

or illness, relative to his health and sensations, have been considered to be in their nature original evidence; such expressions being ordinarily the natural consequence, and the outward indication of co-existing sufferings. The representations of a patient to his medical attendant, who has an opportunity of observing whether they correspond with the symptoms to which they refer, appear to be entitled to greater weight, than if made to an inexperienced person, and to afford a stronger presumption that they are genuine (1). But although not made to a medical man, they appear to be admissible evidence. (2)

Relation of previous symptoms.

When a patient enters into a history of his complaint, and relates some earlier symptoms, experienced at a former period, he is giving a narrative from memory, rather than yielding to the impressions forced upon him by his situation; and it would seem, upon principle, that what he says ought not to be received in evidence. The case of *Aveson v. Lord Kinnaird*, (3) as to this point, appears to have been decided on its peculiar circumstances. That was an action upon a policy of insurance, by which the plaintiff had insured the life of his wife. The plaintiff produced a surgeon as a witness, who had given a certificate upon which the policy had been effected, that the wife was in good health on a particular day; and he swore at the trial to his belief of the fact. On cross-examination, he stated, that his opinion was formed principally from her answers given at the time. The defendant, in order to meet this evidence, produced a witness who had been an intimate friend of the wife, and had called accidentally upon her within a week after the day to which the certificate related, and found her in bed with the appearance of being ill: and the wife related to this witness that she had not been well from a time which included the day specified in the certificate. This evidence of the defendant's witness was allowed; first, on the ground that

(1) See the observations of the Attorney General (Copley) in the *Gardiner Peerage* case, p. 79.

(2) *Aveson v. Lord Kinnaird*, 6 East, 188, where the representations were made to an intimate friend. And the rule is there laid

down by Lord Ellenborough, with regard to patients, without qualification. The representations admitted in that case were opposed to other representations made by the same individual to a surgeon.

(3) 6 East, 188.



it was the declaration of a patient on the subject of her own health at the time; and secondly, that it was a species of cross-examination of the surgeon produced by the plaintiff, and who had formed his opinion principally in consequence of the wife's answers. It is to be observed, however, that the part of the wife's conversation with the defendant's witness, which was material to the case, did not relate to her contemporary sensations, but to the state of her health at a previous time; an objection which does not appear to have applied to the answers given to the surgeon.

In the Gardiner Peerage case, where the inquiry turned upon the ordinary period of gestation, the medical witnesses were not allowed to state what they had been told by women, whom they had attended in their confinement, as to the date of their conception. It was held to be an objection to the evidence tendered, that it related to a circumstance which took place before the medical men were consulted. (1)

Although it is now settled, that what a patient says to a medical man about his sufferings is receivable in evidence, (2) it might seem that a statement by him respecting the particular cause of his sufferings, (as, for example, the circumstances of an assault which he had received,) would be open to greater objection. It was, however held in the case of *Thompson and Uxor v. Trevanion*, (3), that what the wife said immediately on receiving an injury, and before she had time to devise any thing for her own advantage, was evidence. From the report of the case,

Cause of injury.

(1) Gardiner Peerage case, p. 79, 136, 170, several of the women were afterwards produced as witnesses, and their evidence shewed in a striking manner, the difference between taking their evidence from their representations to the medical witnesses, and taking it in open court, subject to being sifted according to those rules, which experience has found to be so useful in separating truth from error.

(2) In *Aveson v. Lord Kinnaird*, 6 East, 188, Lawrence, J., says, it is every day's experience that what a

man has said of himself to his surgeon, is evidence to shew what he suffered by reason of an assault.

(3) Skinner, 402, cited by Lord Ellenborough in *Aveson v. Lord Kinnaird*, 6 East, 188. In *Adams v. Arnold*, 12 Mod. 375, an action of assault on plaintiff's wife, and getting her with child; what the wife declared in her labor was rejected. But as the nature of the wife's declaration is not stated, nor the reason assigned for its rejection, the case is of little value.

which is very short and loose, it may perhaps be presumed, that the wife had related the particulars of the assault: and in *R. v. Foster*, (1) it was held by Gurney, B., and Park, J., that what a deceased person had said immediately upon receiving a fatal injury, as to the cause of the injury, was admissible evidence. It may be observed, that these cases differ from those which have been decided respecting the statement of a patient's complaint; for statements of the latter description would not, it is conceived, depend, for their admissibility, upon the time when the injury was received.

Complaint in  
rape.

In prosecutions for rape, though it has been regarded as admissible evidence, on the part of the prosecution, and is generally considered essential, to show that the prosecutrix made a complaint recently after the commission of the alleged crime; (2) yet it has been held, that the particulars of the complaint are not evidence of the truth of the statement. (3) It is now the general practice to exclude any mention of the details of the complaint. In case of the death of the party injured, or in case of her absence for any cause, the particulars of her complaint, stated in the absence of the prisoner, could, under no circumstances, be received; which shows that such statements are not regarded as part of the *res gestæ*. (4) This further appears from the consideration, that what is deemed a recent complaint depends on various circumstances, and especially on the opportunity of communicating with female relations.

Declarations  
accompanying  
possession.

Declarations of persons in possession of property have, in

(1) 6 C. & P. 325. But see *R. v. Clarke*, *infra*, n. 3.

(2) The point is rather assumed than expressly decided in *Brazier's case*, 1 East's P. C. 444. But it is the common practice to give evidence of this nature; and the absence of recent complaint, unless explained by particular circumstances, is generally fatal to the prosecution, see 1 Leach, 199. 1 Russel on Crimes, 565. According to the old law respecting rape, it was required that the woman should have gone to the next town,

immediately after the offence was committed, *cum clamore et lutesio*, 1 Hale's P. C. 632. Barrington notices that certain periods, within which complaint was to be made, were limited by the laws of several countries. Observations on the Statutes, p. 125.

(3) *R. v. Clarke*, 2 Stark. C. 242.

(4) It seems formerly to have been considered, that the narrative of an infant presently after the wrong done, was receivable in evidence. See the authorities in 1 East's P. C. 441.

some cases, been received as original evidence, explanatory of the nature of their possession. Thus, the declaration of a widow, in possession of certain premises, that she held them for life, and that after her death they would go to the heirs of the husband, have been held admissible, to negative the fact of her having had twenty years' adverse possession; but it seems to be now considered, that such declarations are not evidence, unless they are against the interest of the person making them. (1)

On a question of legitimacy, the declaration of a lady, whose marriage was in question, that a certain box contained her marriage certificate, was, after objection, received both by Chief Justice Dallas and Lord Tenterden, C. J., as evidence, that she was then in possession of a document of a particular description. (2) Here the fact of possession was inferred from the declaration, which was not merely explanatory of a known possession.

Possession inferred from declaration.

The original evidence of verbal or written matters, which has been here considered, is often said to be admissible, as constituting a part of the *res gestæ*. In several of the examples above given, the words or writings are in themselves independent transactions, yet in some, they are the ultimate facts of inquiry, not necessarily connected with any act done; in others, they are receivable as the natural and immediate result of particular situations, impulses, or feelings. (3)

Original declarations not part of the *res gestæ*.

(1) *Doe v. Pettet*, 5 B. & A. 224. *Doe v. Richarly*, 5 Esp. 4, was a case decided apparently on the principle mentioned in the text. There the declarations of a person, found in possession of premises, that he rented them, were held to be evidence of an underletting. The case is opposed by a conflicting decision, *Doe v. Payne*, 1 Stark. C. 86. See 4 Taunt. 766. *Doe v. Williams*, 6 B. & C. 41. *Doe d. Sweetland v. Webber*, 1 Ad. & Ell. 738. It is difficult to distinguish the class of cases under consideration, from a numerous class of cases in which declarations of deceased persons against interest

are admissible. *Carne v. Nicoll*, 1 Bing. N. C. 430. And it may perhaps be thought, that the case in the text belongs to this class, though such is not stated to be the ground of the decision. There is another numerous class of cases, where declarations of persons are received on the ground that a party to the suit is identified in interest with the declarant.

(2) *Bere v. Ward*, printed report of trial on first issue; and on second issue, p. 164. The evidence was offered for the purpose of connecting a certificate produced in evidence, with a document in her custody.

(3) The nature of those words or

Original declarations part of the *res gestæ*.

Words and writings appear, perhaps, more properly to be admissible as part of the *res gestæ*, when they accompany some act, the nature and object or motives of which are the subject of inquiry. In such cases, words are receivable as original evidence, on the ground that what is said at the time affords legitimate, if not the best, means of ascertaining the character of such equivocal acts as admit of explanation, from those indications of the mind, which language affords. For where words or writings accompany an act, as well as in the instances before considered where they indicate the state of a person's feelings or bodily sufferings, they derive their credit from the surrounding circumstances, and not from the bare expressions of the declarant. And the language of persons at or about the time of their doing a particular act, in the same manner as their demeanor or gesture, is more likely to be a true disclosure of what was really passing in their minds, than their subsequent statements as to their intentions, even if such statements would not be excluded on other grounds.

Fraudulent representation.

Envelope.

Declarations of wife.

Thus, in an action on the case for fraudulently representing the solvency of a person, whereby the plaintiffs trusted him with goods, their declarations at the time they were applied to for the goods, are admissible, to show that they gave trust in consequence of the representation. (1) A letter, being the envelope of a promissory note, has been admitted to show for what purpose it was sent. (2) In an action for criminal conversation, where the defence was, that the plaintiff had connived at his wife's elopement, evidence was received on the part of the plaintiff of the wife's declarations as to her intentions and purposes in going. (3) And in *Aveson*

writings which are facts in themselves, will be further illustrated in the section which treats of admissions.

(1) *Fellowes v. Williamson*, 1 M. & M. 306. The goods were furnished five months after the representation; but the representation was expressly referred to on delivery. And see *Moore v. Strong*, 1 Bing. N. C. 441; conversation at

time of delivering goods, to shew whether furnished by way of payment.

(2) *Bruce v. Hurley*, 1 Stark. 24. The plaintiff's own letter was admitted for himself, to shew that the note had been sent to procure payment, the question being, whether it was in a bankrupt's possession for a special purpose only.

(3) *Hoare v. Allen*, 3 Esp. 376.

v. *Lord Kinnaid*, (1) Lord Ellenborough observed, that if a wife, upon quitting her husband's home, declared at the time that she fled from immediate terror of personal violence, he should admit the evidence; though not, if it were a collateral declaration of some matter which happened at another time. In an action against a sheriff for a false return, where the defence was a fraudulent bill of sale, declarations by the party executing the bill of sale, made by him at the time of execution, were held to be admissible, but not those made at another time. (2) Where a trader, being in embarrassed circumstances, executed an assignment for the benefit of his creditors, it was held, in an action after his death against the assignee, treating him as executor *de son tort*, that a list of creditors made out about the time of the execution of the assignment, by the direction of the assignor, was evidence as part of the transaction for the purpose of disproving fraud. (3)

Fraudulent  
conveyance.

Upon questions of bankruptcy, where the intentions of the Bankruptcy.

The evidence was doubtfully admitted. The wife represented that she was only going to her uncle's house, and the husband suffered her to go under that impression.

(1) 6 East, 188. And see *Walter v. Green*, 1 C. & P. 621. Confession by a wife of adultery immediately previous to being turned out of doors; and letters found in her writing desk.

(2) *Philips v. Eamer*, 1 Esp. 357. For other examples of the *res geste* principle, see *Penn v. Scholey*, 5 Esp. 243. An affidavit to explain an execution on a judgment. *Bebb v. Thomas*, 2 W. Bl. 1043. Contemporary declarations, explaining equivocal act of cancelling a will. *Irving v. Greenwood*, 1 C. & P. 350. Action for breach of promise of marriage, evidence of parent's disapproval and reasons assigned for it. *Tilk v. Parsons*, 2 C. & P. 201. Reasons assigned by third persons not allowed to be given in evidence. *Ashley v. Harrison*, 1 Esp. 50. *S. P. Rex v. Whitehead*, 1 C. & P. 69; letters of person indicted

for a conspiracy, shewing that he was the dupe of others. *Collenridge v. Farquarson*, 1 Stark. C. 259. A distinction between an entry in an account book made after the transaction, and a contemporaneous entry. It often happens that declarations which are in their nature original evidence, are also receivable on the ground that they are made by persons identified in interest with the parties to a suit. As in *Kent v. Lowen*, 1 Camp. 177, where letters from the payee to the maker of a promissory note, contemporaneous with the making of the note, were held admissible to prove usury, on the ground that the plaintiff claimed title through the payees. See per Park, J., in *Beauchamp v. Parry*, 1 B. & Ad. 91.

(3) *Lewis v. Rogers*, 1 Cr. M. & R. 48. 4 Tyr. 872. And see *Prideaux v. Collier*, 2 Str. 57. Declarations by a drawee on presentment of a bill. *Ryle v. Haggie*, 1 Jac. & W. 234; declarations as to property being parted with by way of gift.

Buying and  
selling.

Preference.

alleged bankrupt are often material to be inquired into, it is usual to give evidence of declarations, as furnishing an explanation of transactions in their nature equivocal. (1) Thus it has been held, that a declaration accompanying a purchase of goods is admissible evidence, to show whether a person sought his living by buying and selling. (2) Similar evidence has been received to explain a bankrupt's motives, where a payment made by him is sought to be invalidated as a fraudulent preference. Upon such a question, it is competent to inquire into the bankrupt's declarations as to the state of his affairs, made about the time of the transaction in question, though not accompanying or connected with that transaction. (3) And it is very common to give evidence of conversations and letters, in order to explain acts, which, according to the intentions of the party at the time, may or may not amount to acts of bankruptcy. (4)

Time of declaration.

Much discussion has arisen with respect to the limits of time, with reference to the date of the transactions insisted upon as an act of bankruptcy, within which the declarations of the alleged bankrupt ought to be proved to have been made, in order to be received in evidence. It is a question for the Court, in each case, to consider, whether the declaration, proposed to be received, does or does not come within a reasonable time of the disputed act: and, for this purpose, the Court will inquire into

(1) Questions on this subject are to be distinguished from numerous questions respecting the reception of admissions of bankrupts concerning their trading, or the petitioning creditor's debt, and which are not explanatory of any co-existing motives. *Parker v. Barker*, 1 Br. & B. 9. *Bromley v. King*, R. & M. 228. Respecting admissions of trading made before bankruptcy. *Smallcombe v. Bruges*, M'Clel. 45. *Sanderson v. Laforest*, 1 C. & P. 46, respecting admissions of petitioning creditor's debt, and *vide infra*, the chapter on admissions.

(2) *Gale v. Halfknight*, 3 Stark. 58.

(3) *Vacher v. Cocks*, 1 M. & M. 353. *Herbert v. Wilcocks*, 1 M. & M. 355, n. That the intention upon such a question is material, see *Cook v. Rogers*, 7 Bing. 438. *Harman v. Fisher*, Cowper, 117. Letters inclosing bills to a favored creditor. *Guthrie v. Crossley*, 2 C. & P. 301. Questions and answers in the absence of the favored creditor.

(4) B. N. P. 40. *Robson v. Rolls*, 9 Bing. 349, to explain act of absenting. That the bankrupt cannot be called to explain an act affecting his commission. *Jay v. Garnet*, 7 Bing. 103.

the existence of any connecting circumstances between the declaration and the act. (1) The rule is not confined to the precise time of the act in question. (2)

In the leading case upon this subject, *Bateman v. Bailey*, (3) <sup>Acts of bankruptcy.</sup> a conversation with the bankrupt was permitted to be given in evidence, which had passed on his return home at night, after having been absent nearly two days. And this case has been recognised, and followed by subsequent authorities to the like effect. (4) In one of the latest cases, the trader absented himself on the 16th of February till the 9th of March; and two letters written by him on the 16th of January preceding, asking for time on two bills of exchange payable in February, were received, as showing that the bankrupt was a needy man, and to give a colour to his absence. (5) In cases where the act of bankruptcy insisted on is a fraudulent transfer, which is not capable of being proved by any single incident, but depends on the situation of the bankrupt, and his conduct and language, with reference to the whole transaction; a considerable interval may frequently elapse between the date of a disputed act of bankruptcy, and that of the declarations calculated to explain it. In the case of *Ridley v. Gyde*, (6) a conversation with a bankrupt was, under the peculiar circumstances of the case, allowed to be given in evidence, which had passed twenty-six days after the disputed act of bankruptcy, which was a

(1) See the observations of the Court in *Ridley v. Gyde*, 9 Bing. 349, and in *Rawson v. Haigh*, 2 Bing. 99.

(2) See the observations of the Court in *Ridley v. Gyde*, 9 Bing. 349. The language of Lord Ellenborough in *Robson v. Kemp*, 4 Esp. 233, confining the inference of intention to previous or contemporary declarations, may, perhaps, be considered as no longer adhered to by the Courts. The rule seems to have been formerly confined to contemporary declarations. Lord Hardwicke, in *Ambrose v. Clendon*, Ca. temp. Hard. 267, where the bankrupt was packing up his books and goods.

(3) 5 T. R. 512. The language

of the Court is not quite so strong as the effect of the decision. See observations on this case, Eden's Bankrupt Law, 3d edit. p. 360. Evans's Pothier, vol. 2, p. 285.

(4) *Newman v. Stretch*, 1 M. & M. 338. *Rawson v. Haigh*, 2 Bing. 99. *Robson v. Gyde*, 9 Bing. 349. There is also a prior case, *Mayler v. Byloe*, 2 Str. 809.

(5) *Smith v. Cramer*, 1 Bing. N. C. 585.

(6) 9 Bing. 349. Mr. J. Park relied much on an intervening circumstance of a fraudulent transfer between the declaration and the act of which the bankrupt, at the time of the declaration, falsely professed a total ignorance.

fraudulent transfer. And, in cases of continuing acts of bankruptcy, as departing the realm, or remaining abroad with intent to defeat or delay creditors, letters or declarations may be received during the continuance of the act of bankruptcy, and long after the commencement of it. Thus, in *Rawson v. Haigh*, (1) where the alleged act of bankruptcy consisted in departing the realm, with intent to delay creditors, two letters were received, one sent from Calais, and the other from Paris, the latter having been written upwards of a month after the time of the bankrupt quitting England.

Declarations  
too remote.

The declarations or letters must be connected with the state of the party's mind at the time ; (2) and in a case, where there was no evidence as to the time, when declarations explanatory of an act of bankruptcy were made, they were rejected. (3)

Declarations  
of conspirators.

Another well known example of evidence admissible as part of the *res gestæ*, is supplied in the instance of prosecutions involving a charge of conspiracy. It is an established rule, that where several persons are proved to have combined together for the same illegal purpose, any act done by one of the party in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of law, the act of the whole party. (4) It follows, that any writings or verbal expressions, being acts in themselves, or accompanying and explaining other acts, and therefore part of the *res gestæ*, and which are brought home to one conspirator, are evidence

(1) 2 Bing. 99. Accordingly, declarations which might be inadmissible, from their remoteness, to explain an act of departure from the dwelling-house, may in some cases, be competent to explain the continuing act of "absenting."

(2) See observations of the Court in *Rawson v. Haigh*, 2 Bing. 99.

(3) *Marsh v. Meager*, 1 Stark. C. 353. And see *Robson v. Kemp*, 4 Esp. 233. In *Lees v. Marston*, 1 Mo. & Ro. 210, Parke, J., held that a statement of a bankrupt could not be received, unless it could be proved to have been

made whilst he was absenting himself, or immediately on his return. This authority was cited in *Smith v. Cramer*, 1 Bing. N. C. 585, *supra*.

(4) Charge of Mr. J. Bailey in *Watson's case*, 32 St. Tr. 7. *Brandreth's case*, 32 St. Tr. 854, 857. *Rex v. Salter*, 5 Esp. 125. *Rex v. Cope*, 1 Str. 144. In such cases it is necessary, that in the opinion of the Judge, there should be given, at some period of the trial, sufficient evidence to go to the jury of concert and connection on the part of the prisoner.



against the other conspirators, provided it sufficiently appear that they were used in the furtherance of a common design. (1)

In *Stone's* case, the prisoner was indicted for treason, and was charged with conspiracy, together with a person of the name of Jackson, to collect and communicate intelligence to the French government. After evidence had been given of a conspiracy for this purpose, a letter written by Jackson, containing treasonable information, and which had been intercepted, was received in evidence against the prisoner. (2) Upon the same principle, in *Hardy's* case, a letter written by the chairman of a meeting in London to a delegate sent by that meeting into Scotland, was received in evidence; the letter containing encouragement to that delegate to proceed in the cause in which he had been engaged by the direction of the meeting in London; and that meeting being composed, amongst others, of the prisoner, the writer of the letter, and the person to whom it was addressed. (3) And in the same case, (4) evidence was admitted to prove, that Thelwall (who was a member of the Corresponding Society with the prisoner) had brought a paper with him to a printer, and desired him to print it; the paper being considered as evidence to prove a circumstance in the conspiracy. In like manner, consultations in furtherance of a conspiracy are receivable in evidence, (5) as also letters or drafts of answers to letters, and other papers found in the possession of co-conspirators, and which the jury may not unreasonably conclude were written in prosecution of a common purpose to which the prisoner was a party. (6) These are ex-

In the nature  
of acts.

(1) *Hardy's* case, 24 St. Tr. 704. What the effect of such evidence will be, must depend on a variety of circumstances; such as whether the prisoner was attending to the conversation; whether he approved or disapproved. By *Eyre, C. J.*, ib. *Stone's* case, 6 T. R. 527. *Rex v. Salter*, 5 Esp. 125.

(2) *Rex v. Stone*, 6 T. R. 527. 1 East's P. C. 97. 25 Howell's St. Tr. 1311, S. C.

(3) *Hardy's* case, 24 St. Tr. 704. The scruple of *Eyre, C. J.*, in consequence of the letter never

having reached its destination, does not appear to have any weight.

(4) 24 St. Tr. 199.

(5) *Lord Russell's* case, 9 St. Tr. 578; cited in *Hardy's* case.

(6) In *Horne Tooke's* case, 25 St. Tr. 220. The draft of a letter intended to have been sent by *Hardy*, as secretary to the Corresponding Society, in answer to another letter, and which was found in *Hardy's* possession, was admitted. And in the same trial, another letter was admitted, which was

amples of acts done, and, although the material part of these acts were, in their nature, only proveable by hearsay, yet the evidence in such cases was original in its nature.

Part of *res gestæ*.

For the same reason, declarations or writings explanatory of the nature of a common object, in which the prisoner is engaged together with others, are receivable in evidence; provided they accompany acts done in the prosecution of such an object, arising naturally out of these acts, and not being in the nature of a subsequent statement or confession of them. Upon this principle, (namely, that the evidence offered is part of the transaction,) in the case of *Damaree* for high treason, the expressions of the mob, in the *Sacheverell* riots, that they designed to pull down the meeting houses, were admitted in evidence. (1) And the same kind of evidence was received in *Lord George Gordon's* case, (2) and on the same principle, the hissing of a mob, their declarations, and inscriptions upon banners have been held to be admissible, as original evidence. (3)

Subsequent statements of conspirators.

But where words or writings are not acts in themselves, nor part of the *res gestæ*, but a mere relation of some part of the transaction, or as to the share with which other persons have had in the execution of a common design, the evidence is not in its nature original. It depends on the credit of the narrator, who is not before the Court, and therefore it cannot be received. Thus on the trial of Hardy for high treason, (4) a question

Letter.  
Hardy's case.

written by the secretary of a society at Sheffield, and was addressed to the prisoner, but was found in Thelwall's possession. And see the point respecting letters found in the possession of co-conspirators in *Watson's* case, *infra*.

(1) 15 Howell's St. Tr. 552.

(2) 21 Howell's St. Tr. 542. The cry of "No Popery." See also in Hardy's trial, the declaration of Thelwall, accompanying the blowing off of the head of a pot of porter.

(3) *Rex v. Hunt*, 3 B. & A. 566. *Redford v. Birley*, 3 Stark. C. 76. Especially declarations shewing that the purpose of the meetings

at night was that of being drilled. A point was raised as to the evidence of inscriptions on banners, being the best evidence; as to which, see the chapter on secondary evidence. A point occurring in the same trial, as to the admissibility of resolutions at a former meeting, seems to depend rather upon the doctrine of admissions, and properly to belong to that part of the present work which treats of the relevancy of proofs. And see *Burdett v. Colman*, 14 East, 183.

(4) 24 Howell's St. Tr. 452, 475. See 32 Howell's St. Tr. 351.

arose as to the admissibility of a letter written by Thelwall, and sent to a third person not connected with the conspiracy, containing seditious songs, which the letter stated to have been composed and sung at the anniversary meeting of the London Corresponding Society, of which society the prisoner and the writer of the letter were proved to be members. The argument in favour of the evidence was, that the letter was an act done in furtherance of the conspiracy; that the letter contained language of incitement, and not merely narrative or confession by a stranger, in which case "*scribere est agere.*" The objection was, that the letter contained merely a relation by the writer, that certain songs had been sung, which could not be evidence against the prisoner. The majority of the Court decided against the admissibility of the letter. The Lord Chief Justice Eyre, the Lord Chief Baron Macdonald, and Mr. Baron Hotham were of opinion, that the letter could not be received. Mr. Justice Buller (with whom Mr. Justice Grose agreed, in thinking it admissible), said, the letter ought to be received in evidence, for the purpose of showing what was the nature and extent of the conspiracy; that in *Damaree's* and *Purchase's* cases, evidence was received of what some of the parties had done, when the prisoner was not there; that, on the trial of Lord Southampton, something said by Lord Essex, previous to the prisoner's being there, was admitted as evidence; and that, in Lord *George Gordon's* case, evidence of what different persons of the mob had said, though he was not there, had been admitted. But the Lord Chief Justice Eyre, and the other judges, considered the letter, not as an act done in prosecution of the plot, but as a mere narrative of what had passed. "Correspondence," said the Chief Justice, "very often makes a part of the transaction, and in that case the correspondence of one who is a party in a conspiracy would undoubtedly be evidence, that is, a correspondence in furtherance of the plot; but a correspondence of a private nature, a mere relation of what had been done, appears a different thing." And with respect to the cases alluded to by Mr. Justice Buller, the Chief Justice observed, "In the cases of *Damaree*, and Lord *George Gordon*, the cry of the mob at the

time made a part of the fact, part of the transaction, and therefore such evidence might properly be received."

On the same trial numerous letters written by co-conspirators were read, and a hymn, and a prayer, and tracts, as one called "The Rights of Swine," and toasts, as one "the lamp-iron at the end of Parliament-street," were received in evidence; being in the nature of verbal acts, for which the prisoner, though not personally present when they were spoken, written, or published, was nevertheless responsible.

Writings in possession of conspirators, before and after apprehension.

It is in consequence of the distinction between writings or declarations which are acts, or part of the *res gestæ*, and such as are in the nature of subsequent statements, that the admissibility of writings often depends on the time when they are proved to have been in the possession of co-conspirators; whether it were before or after the time of the prisoner's apprehension. Thus in the trial of *Watson*, (1) some papers, containing a variety of plans and lists of names, which had been found in the house of a co-conspirator, and which had a reference to the design of the conspiracy, and in furtherance of the alleged plot, were held to be admissible evidence against the prisoner. All the judges were of opinion that these papers ought to be received; inasmuch as there was in the case strong presumptive evidence, that they were in the house of the co-conspirator before the prisoner's apprehension; for the room in which the papers were found had been locked up by one of the conspirators. And the judges distinguished the point in this case from a point cited from *Hardy's* case, where the papers were found after the prisoner's apprehension in the possession of persons, who, possibly, might not have obtained the papers till afterwards. (2)

(1) 32 How. St. Tr. 348, 350. 2 Stark. C. 140. A sketch of a machine with scythes, to act against cavalry, and a plan of the Tower of London, were given in evidence.

(2) And see a point as to the inadmissibility of a paper con-

taining questions and answers calculated to excite mutiny in the army. Where it was held that the question of publication was irrelevant to the inquiry; but it was doubted whether it had been clearly proved that the paper in

The principal decisions respecting writings and declarations used by conspirators have been pronounced, on the occasion of trials for high treason ; but similiar evidence has been frequently given upon prosecutions for conspiracy merely, for riot, and, generally, for offences perpetrated by confederates. (1) And the principles upon which such evidence is admitted, are equally applicable to the trial of civil injuries, in the commission of which different defendants have concurred. (2)

Declarations of rioters.

Civil actions.

But evidence of this description is inadmissible in actions where no common motives or object can be imputed, as in actions for negligence ; (3) at least, it ought not to affect co-defendants, where such a consequence can be avoided. And it would seem, that the principle upon which the declarations of associates are admitted, in civil actions, not less than in proceedings upon criminal charges, only applies where such declarations are strictly part of the transaction in question. (4)

Common design.

In the case of *Pyke v. Crouch*, (5) a letter written by a stranger to the suit, acknowledging the receipt of a will, was admitted as evidence, to show that such a will had been sent by

question was intended to be used in furtherance of the common purpose.

(1) Such evidence was repeatedly given upon the trials under the Nottingham Special Commission, A. D. 1832, on prosecutions for demolishing a mill, and for arson ; the offences having been committed by a riotous mob. Also in actions against the hundred, arising out of the same disturbances. The like evidence is often given in cases of confederacies for uttering counterfeit coin. And on trials for felonies of various kinds, involving a charge of conspiracy. See 6 T. R. 528.

(2) Per Lord Ellenborough, *Rex v. Hardwicke*, 11 East, 585. See *Powell v. Hodgetts*, 2 C. & P. 432. *North v. Miles*, 1 Camp. 389. *Bowsher v. Cally*, 1 Camp. 391. In civil actions, the question has commonly turned upon the point, whether the expressions of agents were admissible against their principals.

(3) *Daniels v. Potter*, 1 M. & M.

501. The statement was received as against the person making it, who had suffered judgment by default.

(4) In *Rex v. Hardwicke*, 11 East, 585, the rule is incidentally laid down by Lord Ellenborough, but apparently without proper limitations : he says, " although an admission by one of several defendants in trespass, will not establish others to be co-trespassers ; yet if that is proved by other competent evidence, the declaration of one as to the motives and circumstances of the trespass, will be evidence against all who are proved to have combined together for the common object." In *Wright v. Court*, 2 C. & P. 232, Garrow, B., admitted the declaration of a co-trespasser as to common motives, in an action for false imprisonment made five weeks after the injury complained of ; he was a defendant on the record, and had not suffered judgment by default.

(5) *Ld. Raym.* 730.

the testator, on the ground that the sending of the acknowledgment was a contemporary act. But it would seem, that it was not proper evidence to establish the fact of receiving the will, though it would be available to explain that fact, if proved to have been written at the time.

Expressions  
collateral.

It is to be observed, that declarations, though accompanied by acts, are not admissible as being part of a transaction, unless when they explain the nature of the acts themselves. (1) This is a distinction of some nicety. Where a prisoner was charged with stealing a guinea, and the prosecutor had told him that it would be better for him to confess, some judges seem to have thought it allowable to prove, that the prisoner gave up the guinea to the prosecutor as the guinea that had been stolen from him. (2)

In the various instances which have been considered in the present section, where evidence of words or writings has been admitted, it is obvious that, as regards the evidence of words, it is liable to greater mistake and misrepresentation than attaches to the evidence of facts. But this objection can be no ground for precluding inquiry into such transactions, as consist of expressions that have been used. And even where the expressions deposed to are explanatory merely of acts or conduct, it is to be observed, that this usually occurs when the matter in dispute could not be proved otherwise, than by the statement of a suspicious or incompetent witness concerning his inward feelings or intentions at a prior time. And further, the expressions given in evidence are limited to a period, when their probability and genuineness are capable of being tested by circumstances in their nature not liable to be misunderstood or perverted.

(1) See observation of Lord Ellenborough in *Aveson v. Lord Kinnaird*, 6 East, 193, as to a collateral declaration by a wife on quitting her husband's house, and Evans's *Pothier*, vol. 2, 287, and *R. v. Clarke*, 2 Stark. *supra*.

(2) *R. v. Griffin*, R. & R. 151. There was a difference of opinion among the judges, and the decision appears questionable, *vide infra*,

*Confessions*. In *Hayalep v. Gymer*, 1 Ad. & Ell. 162, it seems to have been thought admissible to prove property in the plaintiff, by evidence of what the plaintiff said upon delivering a chattel, as to the terms upon which the plaintiff had received it. There was another ground, *vide infra*, *Admissions*. And see *R. v. Foster*, 6 C. & P. 325, *supra*.

## SECTION II.

*Of the Exclusion of Hearsay Evidence.*

The technical meaning of the term *hearsay evidence* having been explained in the preceding section, it remains to state, that the general rule of evidence is, (and it is a rule of very extensive influence in the law,) that hearsay reports of transactions, whether verbal or in writing, given by persons not produced as witnesses, are not receivable.

Hearsay excluded.

The principle of the rule, according to which evidence is rejected on the ground of its being hearsay, is that such evidence requires credit to be attached to a statement made by a person, who is not subjected to the ordinary tests enjoined by the law for ascertaining the correctness and completeness of testimony:—the author of the statement not delivering his evidence or being interrogated in the presence of a Court of Justice, and not speaking under the moral and political sanctions of an oath; his character and motives not being investigated, his deportment not being observed. It may be further remarked, that other objections apply to this species of evidence, which are equally applicable to evidence of oral matters in general, and which seem to render the application of the tests referred to peculiarly necessary. Such evidence is very liable to be fallacious, from the facility by which it may have been imperfectly heard, or may have been misunderstood, or inaccurately remembered, or may have been perverted or altogether fabricated. It is to be observed also, that persons communicating such evidence are not subject to the danger of a prosecution for perjury (in which a contradiction by two witnesses is requisite); for where the hearsay statement is stated to have been made when no third person was present, or purports to be that of a deceased person, the witness has no cause to be apprehensive of punishment, even though he entirely fabricates it.

Policy of the rule.

“ With reference to the necessity of an oath or affirmation,” says Mr. Justice Buller, “ no evidence is to be admitted but what is upon oath. And if the first speech was without oath, another oath that there was such a speech, makes it no more than a bare speaking, and so of no value in a Court of Justice.”(1) The misconstructions to which evidence of oral matters is subject from the ignorance or inattention of hearers, or from criminal motives, are powerfully adverted to by Mr. Justice Foster in his treatise on the Laws of Treason. (2)

With respect to the statements of persons not produced as witnesses, but who might be produced, there are the same reasons for the exclusion of the evidence as exist for the rejection of secondary evidence, where that of a superior description is attainable. But where a person, who has related a particular fact (whether casually or upon oath, and in a judicial proceeding,) is dead, or for some good cause cannot be produced, additional and strong reasons are required to justify the exclusion of the evidence.

For the reasons which have been stated, it may be thought, that in the great majority of cases where hearsay evidence might be tendered, it would not enable juries to arrive at a safe conclusion upon the matters submitted to them. Unless it were clear that the discovery of truth would be materially promoted by the admission of such evidence, the inconveniences in regard to the expense to be incurred by the opposite party who would have to encounter such evidence, in regard also to the consumption of public time which its production would occasion, ought to be weighed against its advantages. Besides, the exclusion of such testimony may have some beneficial effect in many instances, by obliging parties to come furnished with evidence from other less exceptionable sources, from which evidence it would be more easy to draw a safe conclusion. In estimating the validity of these reasons, we must take into consideration the motives for

(1) B. N. P. 294. And see *Per Lord Tenterden in Doe v. Bayley and Littledale, J.*, in *Ridgway*, 4 B. & Ald. 55.  
*Spargo v. Brown*, 9 B. & C. 938. (2) Foster on Treasons, 200.



falsifying judicial evidence, and the limited means of detecting such falsehood by that tribunal to which the constitution entrusts the determination of questions of fact; regard must also be had to the persons of which that tribunal is composed, and to the shortness of the time afforded for estimating evidence which tends to an indefinite extent, which produces so many collateral questions, and which requires very nice discrimination in those who are to decide upon it.

It will probably be thought, by persons acquainted with judicial proceedings, that juries do not, in general, properly discriminate between hearsay and original evidence. An opportunity of noticing this frequently occurs, in cases relating to the various exceptions to the rule of exclusion; and, more particularly, where hearsay evidence is introduced collaterally; as, where it is part of a confession of one prisoner affecting another prisoner, or where it is contained in a letter which is introduced for a different object, or where it consists of a statement of hearsay matters made in the presence of a party to the suit. In such cases, the hearsay evidence generally has much too strong an effect upon the jury, however the Judge may caution them not to give weight to the evidence as proving the truth of the facts therein stated.

The rule of exclusion under consideration is not of great antiquity; so late as the year 1790, it does not appear to have been settled with regard to depositions taken before magistrates, whether upon criminal charges or upon other occasions; and, as will appear from the following pages, several of the exceptions to the rule of exclusion have been much narrowed within very modern times. (1)

History of rule.

Throughout the state-trials before the time of the Commonwealth, the worst species of hearsay was constantly received, consisting of the examinations of persons who might have been produced as witnesses, of others convicted of capital offences,

(1) One of the earliest cases in which the rule was acted upon is *Sampson v. Yardley Pasch.* 19 Car. 2, Keb. 223, pl. 74.

and of others who had signed confessions in the presence only of the officers of government and under the tortures of the rack.

Raleigh.  
Stafford.

On the trial of Sir Walter Raleigh, for example, the only piece of evidence directly affecting Raleigh, was a paper, purporting to be a statement by a third person, of the effect and result of Lord Cobham's examination, and signed by him under threats of the Chief Justice. This was admitted, as the Chief Justice observed, lest there should be "a gap opened for the destruction of the King," though Sir W. Raleigh urged, "that he might see his accuser face to face; and if, being charged on his soul, Lord Cobham affirmed the matter of the examination, he consented to be taken to be guilty." In like manner, on Sir R. Throgmorton's trial the principal deposition had been taken from a man, who had been convicted of treason, but whose execution had been respited several times, in order to induce him to accuse the prisoner.

Popish plot.

Even during the reign of Charles the Second, though the practice of reading the depositions of persons, who might have been produced as witnesses, was discontinued, yet hearsay evidence was allowed in many cases, in which it would now be rejected. On the trials for the Popish plot, the evidence consisted principally of a narrative of the transactions of the supposed conspirators in various countries, collected during a long period of time from a multitude of letters, the contents of which were given from recollection; the witnesses not having taken a note of any part of the letters at the time of reading, not having read them for a great number of years, nor being required in reading to notice their contents, and not producing one of the letters, nor a copy, nor even an extract.

Extent of the  
rule.

This rule applies, although the account has been given upon oath, and in the course of a judicial proceeding; as, where a pauper has been examined upon oath (unless under particular statutes,) by magistrates, respecting his parochial settlement; (1)

(1) *R. v. Nuneham Courtney*, 1 East, 373. *R. v. Ferry Frystons*,

or where a deposition has been taken by magistrates upon a criminal charge, in the absence of a prisoner. (1)

The rule applies also, notwithstanding that no better evidence is to be found, and though it be certain that if the account is rejected, no other can possibly be obtained: as, where the evidence purports to be the narrative of an eye-witness of a transaction, and that witness the only one, and he since dead.

Doubts were formerly entertained, whether declarations by an attesting witness to a will or other instrument might not be given in evidence after his death, to shew that he had forged or fraudulently altered the instrument. It was suggested, that as the one party used the declaration of the subscribing witness, evidenced by his signature, to prove the execution, the defendant might use any declaration of the same witness to disprove it: and further, that the declaration was a substitute for the loss of the benefit of cross-examination, which might have been had, if the witness had been alive and examined. But in the case of *Stobart v. Dryden*, (2) it was held, that such declarations were inadmissible in evidence. The observations of the Court upon the inconvenience, which would attend the adopting of an exception in such a case, illustrate the general expediency of the rule. It was said, that "the rights of parties under wills would be liable to be affected at remote periods by loose declarations of attesting witnesses, which these parties would have no opportunity of contradicting, or explaining by the evidence of the witnesses themselves." The party impeaching the validity of the instruments would, it is true, have an equivalent for the loss of his power of cross-examining the living witness: but the party supporting it, would have none for the loss of his power of re-examination."

Declaration of  
attesting  
witness.

2 East, 54. *R. v. Abergwelly*, ib. 63. See *R. v. Eriswell*, 3 T. R. 725.

(1) See *R. v. Crowther*, 1 T. R. 125. *R. v. Smith*, 2 Stark. 208. Holt, 614. *R. & R. Cr. C.* 339, *vide infra*. Where depositions before magistrates, and the decisions respecting depositions before a coroner, taken in the absence of

a prisoner, are more particularly considered.

(2) 1 M. & W. 623. In which case the authority of *Wright v. Lettler*, and a *nisi prius* decision, cited, with approbation by Lord Ellenborough and Mr. J. Bayley, are examined, *vide infra*, *Dying Declarations*.

## CHAPTER XIII.

EXCEPTIONS TO THE RULE EXCLUDING HEARSAY EVIDENCE.  
RELAXATION IN THE CASE OF PARTICULAR SUBJECTS OF  
INQUIRY.

**I**T is obvious that the objections to hearsay evidence do not apply with the same force to every species of it; and that the inconvenience of rejecting it must be greater in some kinds of inquiry than in others. Hence the Courts have established various exceptions to the rule which excludes hearsay evidence. The expediency of this rule of exclusion cannot indeed be satisfactorily judged of, without taking a view of such exceptions. For, on the one hand, the exceptions may be thought to obviate many objections which would exist, if the rule were unlimited in its operation, whilst, on the other, they have occasioned a substantive mischief in the mass of legal decisions arising out of them,—decisions, which present many subtle distinctions, and not unfrequently conflicting opinions of the Courts. It will also probably be thought that, in some instances, the rule of exclusion has been injudiciously relaxed, and in others, that it has been unnecessarily maintained in its full strictness.

It is proposed to treat in the present chapter of the exceptions to hearsay, which have been made in regard to particular subjects of inquiry. The first section will treat of hearsay evidence in matters of pedigree, and the second of hearsay evidence in matters of public right or public interest.

## SECTION I.

*Relaxation, in the case of Pedigree, of the Rule which excludes Hearsay Evidence.*

Hearsay statements of deceased persons are allowed to be received in matters of pedigree, subject, however to various qualifications. This exception appears to be founded on the considerations, that the facts which are the subject of inquiry are frequently of an ancient date, and that the knowledge of them is usually confined to a few individuals. By limiting the exception to the statements of deceased persons, a resort to this kind of evidence is precluded, where the hearsay tendered indicates the existence of more satisfactory proof, and is only admitted on failure of the ordinary channels of information. According to the qualifications under which evidence of pedigree is received, provision is made that the statement should be derived from a person who would be likely to be well informed upon the subject on which he was speaking, and who should have no apparent motive for perverting the facts.

Hearsay included.

The exception in question is framed upon general principles adapted to circumstances of frequent occurrence. It may happen, that these principles will fail of application in many instances to which the exception might seem to extend. The exception is not confined to ancient facts, but extends also to matters of pedigree which have recently transpired; and the hearsay of deceased witnesses is admitted as to facts, which occurred in the presence of many living witnesses.

“It would be impossible,” says Lord Erskine, “to prove descents according to the strict rules, by which contracts are established and rights of property regulated, requiring the facts from the mouth of the witness who had the knowledge of

them." (1) "On inquiring into the truth of facts which happened a long time ago," says Mr. Justice Le Blanc, (2) "the Courts have varied from the strict rule of evidence applicable to facts of the same description happening in modern times, because of the difficulty or impossibility, by lapse of time, of proving those facts in the ordinary way by living witnesses." On this ground hearsay and reputation (which latter is no other than the hearsay of those who may be supposed to be acquainted with the fact handed down from one to another) have been admitted as evidence in particular cases. On that principle stands the evidence in cases of pedigree, of declarations of the family who are dead, and of monumental inscriptions, or of entries made by them in family Bibles. Such evidence, observes Lord Eldon, in *Whitelock v. Baker*, (3) is admitted on the principle, that it is the natural effusion of a party who must know the truth, and who speaks upon an occasion where he stands in an even position, without any temptation to exceed or fall short of the truth.

It will be convenient, in the present section, to consider in order,

1. *What are matters of Pedigree.*
2. *The different forms of Hearsay Evidence in cases of Pedigree.*
3. *The qualifications under which Hearsay Evidence is received in cases of Pedigree.*

Pedigree,  
matters of.

First, Pedigree, with reference to the subject under consideration, consists of general evidence of descent or relationship, of evidence of particular facts, as births, marriages, and deaths, and of the time when such events occurred, either absolutely or relatively to each other. (4)

(1) 13 Ves. 143. And see by Best, C. J., 9 B. Moore, 188.

(2) 10 East, 119.

(3) 13 Ves. 514. These observations are adopted by the Lord Chancellor in *Monkton v. Attorney General*, 2 Russ. & Myle, 162.

And see upon the subject of hearsay and relaxations of the old rules of evidence, Burke's Works, vol. 14. Report from Committee appointed to inspect the Lords' Journals.

(4) In *Monkton v. Attorney*

Thus, upon questions whether a testator at the time of making his will was of full age, a written memorandum by a deceased parent, stating the time of his birth, has been admitted to be good evidence. (1) In like manner, the declarations of parents are admissible to prove, that a birth took place before marriage, as well as to disprove the fact of marriage entirely. (2) In an issue out of Chancery to try whether A. B. was the eldest son born out of wedlock, the declarations of his elder brother that he himself was a bastard, were received. (3) On a question, which of three children, all born at a birth, was heir, evidence was admitted, on one side, of declarations by the father stating which was the

Time of birth.

General, 2 Russ. & Mylne, 161. The Lord Chancellor describes as matters of pedigree, such points as these,—“who was related to whom; by what links the relationship was made out; whether it was a relationship of consanguinity, or of affinity only; when the parties died, or whether they are actually dead.” In *Kidney v. Cockburn*, 2 Russ. & Mylne, 167, it is reported, that Tindal, C. J., at nisi prius, rejected the evidence of inscriptions on a tombstone and monumental tablet, and also of declarations, and of a letter stating the ages of individuals; on the ground, that although relationship in general might be proved by hearsay, particular facts, such as the ages of parties, could not. The Lord Chancellor, however, expressed a contrary opinion, as also Mr. J. Park, and Mr. J. Littledale, to whom the point was submitted. The Lord Chancellor, notwithstanding, granted a case for the opinion of the Court of K. B. But the cause was compromised. The case of *Herbert v. Tucknal*, T. Raym. 84, is a precise authority for admitting hearsay as to dates; and the admissibility of such evidence is to be collected from Lord Mansfield's words in *Goodright v. Moss*, Cowp. 591, and from general practice. It was received by Littledale, J., in *Ryder v. Malbon*, cited 2 Russ. & Mylne, 169.

(1) *Herbert v. Tucknal*, Tr. at Bar, Sir T. Raym. 84, cited 7 East, 290. And see *Johnston v. Parker*, 3 Phill. 42. Per Lord Mansfield, in *Goodright v. Moss*, Cowp. 593.

(2) *Stevens v. Moss*, Cowp. 593. *Stapylton v. Stapylton*, and Lord Valentia's case, cited ib. *Rex v. St. Peter*, Burr. Sett. Cases, 25. *Rex v. Bramley*, 6 T. R. 330. *May v. May*, 1762, Tr. at Bar. B. N. P. 112. *Cooke v. Lloyd*, Peake's Ev. App. 78.

(3) *Cooke v. Lloyd*, Peake's Ev. App. 78. The evidence was deemed admissible, as the representation of one of the family respecting the degree of relationship which he bore to it. In the same case, evidence was given of the declarations of the parents, as to the date of their marriage; of opprobrious epithets applied by the father to the children, alleged to be born before the marriage, and to the wife; and of declarations of the father on his death-bed, having pointed to a younger son as his heir. The declaration of the elder brother was after he had conveyed away the estate. And see *Rex v. Nottingham*, 13 East, 57, n., that a person is competent to give evidence of his own illegitimacy, as by statements touching acknowledgment and reputation. Concerning declarations of legitimacy, see *Berkeley case*, 4 Camp. 401.

eldest son, and that he called them Stephanus, Fortunatus, and Achaicus, (according to the order of names from St. Paul's Epistle,) for the purpose of distinguishing their seniority; on the other side, the Court received declarations by a relative, who was present at the birth, and who, upon the birth of the second and third child, took a string and tied it round their arms, to know them from the eldest. (1) A variety of illustrations of what is deemed in law matter of pedigree, will be found under the subsequent heads of this subject.

**Place of birth.**

The exception in favor of admitting hearsay testimony in matters of pedigree has been limited to cases, in which the facts are peculiarly within the knowledge of relations, on the ground, that in those cases only exists the necessity for relaxing the general rules of evidence. Thus, it has been held, that the declarations of a deceased parent, though they are good proof of the time of a child's birth, yet that they are not admissible as evidence of the *place* of the birth. (2) "The point in dispute," said Lord Ellenborough, in a case where the admissibility of such evidence was discussed, "turns on a single fact involving only a question of locality, and, therefore, not falling within the principle of the rules applicable to cases of pedigree." (3) It may be observed, however, that this fact is seldom proveable, except by the evidence of relations. (4)

**Non-access.**

It has been stated as a ground for rejecting the evidence of a father or mother as proof of want of access, (to bastardize a child born during wedlock,) that the want of access, implying the continued separation of the parties, must be notorious to the whole neighbourhood where they resided, and is,

(1) Vin. Ab. Ev. T. b. 91. Referred to by Lawrence, J., in the Berkeley case, 4 Camp. 401. The second question to the Judges in the Berkeley case, 4 Camp. 403, 418.

(2) Rex v. Erith, 8 East, 542.

(3) *Ib.*

(4) It is seldom that the fact of

birth can be proved, except by relations and a few other persons, since it has been held that the baptismal register, is not, *per se*, evidence of the place of birth; nor of the fact of a person having been known to be in a parish at an early age.



therefore, capable of more satisfactory proof; (1) and this objection would apply to their declarations, provided by the term non-access is meant want of opportunity for sexual intercourse. If, by the term is meant the fact of sexual intercourse, it should seem that the declarations could only be rejected on the ground of interest or public policy. The admissibility of declarations of the wife as to incontinence with other persons, and particularly as to that sort of intercourse whereby a child might be produced, and to which she might be examined, if living, does not appear to have been decided. Both the wife's and the husband's declarations as to facts in general tending to the proof of illegitimacy have been rejected. (2)

Formerly, it was the practice to admit the declarations of deceased persons as to particulars concerning their settlements. (3) But it is now settled that all such evidence is inadmissible. (4)

(1) B. N. P. 113, citing *Rex v. Reading*, and Rep. temp. Hardw. ib. 79.

(2) *Roe v. Reading*, Rep. temp. Hard. 79, as to the ground of interest. *Stapleton v. Stapleton*, ib. 277. *Stevens v. Moss*, Cowp. 593, as to the ground of policy. *Rex v. Luffe*, 8 East, 203. *Rex v. Kea*, 11 East, 133. 1 Wils. 340. *Burr. Sett. Cases*, 25. 8 Mod. 180, *vide supra*, the chapters on incompetency of witnesses to give evidence upon particular subjects; and *infra*, chapter on *Presumptive Evidence*. Notwithstanding the observations of Lord Ellenborough in *Rex v. Luffe*, as to the wife's proof, "that the adulterer alone had that sort of intercourse with her, by which a child might be produced within the ordinary period," it appears to have been considered, that a wife cannot, by her sole testimony, bastardize her issue; but, as it would seem, that the fact of non-access must also be proved, and that by other witnesses. *R. v. Luffe*, 8 East, 203. *R. v. Reading*, Rep. temp. Hard. 82. *R. v. Bedall*, 2 Str. 941, 1076. And upon these authorities, Alderson, J., re-

jected the *declarations* of a deceased wife, tending to shew that her son was not begotten by her husband, but by another man. The precise nature of the declarations does not appear in the report. The declarations of the husband were also rejected, as being more objectionable, on the ground of interest. It may be questioned, however, whether the declarations of the wife were not, in that case, admissible, for the purpose of shewing the fact of an adulterous connection; as to which, Mr. J. Alderson observes, that he did not know that her declarations, even to that extent, had ever been received.

(3) *R. v. Greenwich*, *Burr. Sett. Cases*, 243. *Rex v. Nuttley*, ib. 701. *R. v. Wareham*, Cald. 141. *Rex v. Bury*, ib. 486. *Rex v. St. Sepulchre*, ib. 547.

(4) *Rex v. Eriswell*, 3 T. R. 707. *Rex v. Chadderton*, 2 East, 29. *Rex v. Nuneham Courtney*, 1 East, 373. *Rex v. Ferry Frystone*, 2 East, 55. *Rex v. Abergwelly*, 2 East, 63. In *Whittuck v. Waters*, 4 Carr. & P. 376, it would seem, that hearsay evidence of pedigree had been rejected, on the ground

Upon settlements.

General kindred.

General kindred, as that a person was heir to another, being his cousin or relation, is matter of pedigree, and declarations to that effect are, it would seem, receivable in evidence, though the point was formerly considered to be doubtful, at least so far as regarded proof of title in an ejectment. (1)

The nature of matters of pedigree, as defined by legal authorities, having been considered, it is proposed, in the next place, to notice the variety of forms, in which evidence of this description has been received in courts of justice.

Forms of hearsay in pedigree

The hearsay evidence, which is admissible in matters of pedigree, may be conveyed under various forms. One class of proofs seems to rest principally on the credit due to the authors of the statements, such as, entries in family Bibles or other family books, family correspondence, descriptions in wills, recitals in deeds, statements in bills, or answers in Chancery. There is another class, apparently resting not so much upon the credit due to the authors of the statements, as upon the adoption of others, such as, inscriptions on tombstones or on coffin plates, engravings on rings, pedigrees hung up in a family mansion, or the like. The authorities, however, do not admit of being arranged with much precision, according to these classifications. The distinction is here noticed, because it will afterwards become important to advert to the examples about to be detailed, according to this view of them.

that the suit did not relate to a matter of pedigree. But there appears to be no foundation for a distinction between cases, where a matter of pedigree is the direct subject of the suit, and other cases where it occurs incidentally.

(1) *Doe d. Futter v. Randall*, 2 M. & P. 24, a declaration by a deceased person, that A. B. was to have his estate, and see per Burrough, J., *ib.* p. 26. By Lord Erskine, 13 Ves. 147. By Lord Chancellor, 2 Russell & Mylne, 158. In *Roe d. Thorne v. Lord*, 2 W. Bl. 1099, it was much discuss-

ed, whether a strict deduction of descent was necessary in ejectment, as from a common ancestor, or at least from brothers and sisters, which was allowed to be an immediate descent. See *Newton v. Newton*, cited *ib.* And a case of *Newton* and the Corporation of Leicester, and the Attorney General was cited, where there was no deduction of pedigree, but the lessor of the plaintiff obtained a verdict, because it was proved that the deceased used to call him cousin.

An entry in a family Bible derives some credit from the circumstance, of its being entered in a book, which is kept as the ordinary register of families. (1) But memoranda inserted in other books, as an almanack, (2) a missal, (3) a prayer-book, (4) and in other documents or papers, (5) have been admitted in evidence.

Entries in  
Bibles.

Correspondence between members of the family, addressing each other as relatives, and making statements of pedigree, have been admitted in several claims of peerage. (6)

Family corres-  
pondence.

Recitals in family deeds, as marriage settlements and the like, have been admitted, on the footing of declarations of relatives. (7) Mr. Baron Perrott is said to have rejected a slip of parchment, found in a shoemaker's shop, and marked Mr. A. B.'s measure, which purported to be two lines of a deed, and contained a recital of descent, but the Court of King's Bench granted a new trial, on the ground that the evidence ought to have been admitted. (8) In an early case, where

Recitals in  
deeds.

(1) By Lord Ellenborough, 4 Campb. 421; and see *Johnston v. Parker*, 3 Phillimore, 82. By Lord Mansfield in *Goodright v. Moss*, Cowper, 594. Lord Erskine, 13 Ves. 514. *Le Blanc*, 10 East, 120. 2 Russell & Mylne, 162. But the Lord Chancellor, considered entries in family Bibles, as standing on the ground of family acknowledgments, and admissible on account of their publicity, without proof that the entries were made by a member of the family.

(2) *Herbert v. Tuckal*, Sir T. Raym. 84.

(3) *Slane Peerage*, 1830, printed minutes, part 2, p. 49.

(4) *Leigh peerage*, 1829, printed minutes, p. 310.

(5) See the answers of the Judges to the second *query* in the *Berkeley case*, 4 Campb. 401. Vin. Ab. Evidence, b. 87, pl. 5, an old book out of Lord Oxford's library, mentioning the pedigree of William Zouch, signed by himself. The entry is not the less admissible, though it expressly purport to be

made for the purpose of perpetuating evidence of legitimacy, *Berkeley case*, 3d *query*. B. N. P. 233. By Lord Mansfield, declarations for the purpose of preventing family disputes, in *Goodright v. Moss*, Cowper, 591. 2 Russell & Mylne, 164.

(6) *Berner's peerage*, Collins on Baronies, 355, 356, 361. *Leigh peerage*, printed minutes, part 2, p. 140. *Huntingdon peerage*, Attorney General's report, p. 357.

(7) Bull. N. P. 233. Carth. 79. *Neale v. Wilday*, 2 Str. 1151. *Chandos peerage*, printed minutes, p. 27. *Stafford peerage*, printed minutes, p. 110. *Zouch of Hurgugworth peerage*, printed minutes, 1804, p. 275; and see *Doe d. Johnson v. Pembroke*, 11 East, 505. 13 Ves. 514. *Lisle peerage case*, pp. 116, 127. *Banbury peerage case*, pp. 6, 117. *Devon earldom*, by Nicholas, 1832, App. pp. 44, 46.

(8) Cited by Thomson, B., 2 Peake, N. P. C. 204.

*vivâ voce* evidence was offered on the part of the plaintiff, that on a former trial in ejectment against the same defendant, a deed had been produced on the part of the defendant, having a clause in it relating to a pedigree, the Court held such proof to be admissible, on the ground that the defendant had the deed in his custody, and might disprove the witness if he swore falsely. (1) But in two recent cases in the Court of Chancery, it has been considered, that recitals in deeds were not evidence of pedigree against persons who were strangers to the deeds. (2) It may be observed, that recitals are frequently in the nature of conventional admissions between the parties to a deed, by which they agree to be bound without reference to the real state of facts.

Descriptions in wills.

A description in the will of a member of the family is also admissible on the same ground, and this even though the will is found cancelled, and not known to have been proved or acted upon, if it appears to have been treated as a paper relating to the family. (3) In the Lisle peerage case, (4) a description in a will, of certain individuals being the next "heirs in blood," was relied upon as showing that a particular person was illegitimate.

It may be observed, that upon principles applicable to the proof of documentary evidence, a probate would not be evidence, even of the fact of relationship, in an action for the recovery of real estate; though it would be otherwise with respect to the ledger book of the Ecclesiastical Court or a copy of it. (5)

(1) *Eccleston v. Petty*, Carth. 79.

(2) *Fort v. Clarke*, 1 Russ. 604. *Slaney v. Wade*, 1 Mylne & Craig, 338, where the recital stated that A. B. was the child of the marriage of the persons named in the deed, and the question was that of A. B.'s legitimacy. On the effect in general of recitals, see *infra*, Chapter on *Admissions*; and *Doe d. Pritchard v. Dodd*, 2 Nev. & Mann. 45. *Bowman v. Taylor*, 2 Ad. & Ell. 278.

(3) *Doe d. Johnson v. Earl of Pembroke*, 11 East, 504. See 7

East, 279.

(4) *Nicholas's Lisle peerage*, 51, 53.

(5) Not even to prove the relationship of father and son by the father's will. *Roll. Abr.* 678. *B.N.P.* 246. *Doe d. Weld v. Ormerod*, 1 M. & Ro. 466. *Dike v. Polhill*, *Lord Raym.* 744. As to the ledger-book, see *Bull. N. P.* 246. In claims of peerage, however, the original wills are generally required to be produced. But a question arose in the late claim to the barony of De Lisle, whether, in support of the claimant's pedigree, the will

In the cases respecting the admissibility of wills, answers, and depositions in Chancery, as evidence of pedigree, some confusion occurs, attributable chiefly to a difficulty in determining, in what particular cases these sources of evidence are open to the objection of being *post litem motam*. (1) Lord Kenyon held the opinion, that a bill in Chancery by an ancestor was evidence to prove a family pedigree stated therein, in the same manner as an inscription on a tombstone or in a Bible. (2) And although, before this, answers and depositions were held inadmissible as proofs of pedigree, there appears always to have been some other ground of rejection peculiar to the case,—as that the answer was made by an infant through his guardian, (3) that the party making it was alive, (4) or that the depositions were not accompanied by the answer. (5) The Judges, however, held, upon a question put to them by the House of Lords, in the Banbury Peerage case, (6) that a bill or depositions in Chancery, in a suit to perpetuate testimony, could not be received as evidence in the Courts below, on the trial of an ejectment against a party not claiming or deriving in any manner under the plaintiff in the Chancery suit, either as evidence of the facts therein deposed to, or as declarations respecting pedigree. They added, (though the question does not appear to have been put to them), that it

Bills, &c. in  
Chancery.

of Ambrose Dudley, Earl of Warwick, dated in 1589, could be read from the register, upon proof that it was the custom of the Prerogative Office, at the time when the will was proved, in nine cases out of ten, to deliver the originals back to the executors, after the wills had been proved and registered. Counsel were directed to ascertain, whether, in consequence of this custom, some cases had not occurred where the books were received in evidence; the result of their search does not appear, but in the principal case the register was afterwards produced, and an examined copy admitted. Nicolas' report of the De Lisle peerage, pp. 51, 52, printed minutes of same, pp. 203, 206. Marchmont peerage case, p. 5. Kilmorrey case, p. 10. But in the Gardiner peerage case, to prove

the marriage of Lord Gardiner at Madras, a book brought from the secretary's office in the India House, containing entries of marriages and burials in Madras, copied from the original register in England, was received. *Vide infra*, where the proof of wills and registers is more particularly treated of.

(1) *Vide infra*, where the subject of the *lis mota* is considered.

(2) Taylor v. Cole, 7 T. R. 3, n.

(3) Eccleston v. Petty, Carth. 79. Eccleston v. Spoke, Comb. 156. 12 Vin. Ab. 94.

(4) Hilliard v. Phaly, 8 Mod. 180.

(5) Piercy's case, Jones, 164.

(6) 2 Selwyn's N. P. 754. Le Marchant's Gardiner peerage, App. 411. And see the opinions of the Judges in the Berkeley case, 4 Campb. 412.

would not make any difference in their opinion, if the bill had been a bill seeking relief.

But it would seem, that the Judges, in their answer to the query put to them by the House of Lords, suppose the existence of a controversy, *lis mota*, as invalidating the deposition; for it certainly has been the practice of the House of Lords, both before and since the opinion was delivered, to admit, as evidence of the pedigrees of claimants of peerage, bills and answers in Chancery, made in suits where the facts of the pedigree were not in dispute, but only incidentally stated. (1)

In the report of the Attorney General (Sir Arthur Pigott) on the claim of Charles Augustus Ellis to the Barony of Howard de Walden, in 1806, he stated that part of the evidence, offered to him in support of the claimant's pedigree, was a bill and answer in Chancery with the decree thereon, which he considered as adequate evidence; because the bill, having set forth the pedigree to show an heirship, the answer did not controvert such heirship; and the decree, after giving leave to the plaintiffs to bring an ejectment to try the title, directed the defendant to admit the heirship. (2) This evidence had been admitted by the House of Lords in an earlier claim to the same barony, (3) and was again admitted in the claim upon which this report was made. (4)

Engravings  
upon rings.

Engravings upon rings (5), and charts of pedigree hung up in family mansions, (6) or found among family documents, (7)

(1) Roos' peerage, printed minutes, 1804, p. 293, 294. Zouch of Hurgugworth peerage, printed minutes, 1804, p. 221. Slane peerage, printed minutes, 1830, part 1, p. 32; part 2, p. 42. Netterville peerage, printed minutes, 1827, p. 43. In these two last cases the bills and answers were from the Chancery in Ireland, the claims being to Irish peerages.

(2) Attorney General's report, 1806, p. 35.

(3) Claim of Sir John Griffin in

1781, minutes reprinted 1806, p. 15.

(4) Printed minutes, Howard de Walden peerage, 1806, p. 25.

(5) 13 Ves. 144, cited 2 M. & P. 26. Besides the information which the common mourning rings may furnish, the Jews engrave upon the wedding ring the date of their marriage. Grimaldi's *Origines Genealogicae, prope finem*.

(6) 2 Cowp. 594.

(7) De Lisle peerage case, report by Nicolas, p. 45. See also the

have been received in evidence. But a pedigree found in the Ashmolean Library at Oxford, unaccompanied by any proof that it was made by a member of the family, or by any person connected with it, was rejected. (1)

Charts of  
pedigree.

Inscriptions on tombstones are constantly received in evidence in questions of pedigree, both in Courts of Law, and by the House of Lords in claims of peerage; (2) and inscriptions on coffin plates in family vaults and graves have also been given in evidence, on the same ground, in several peerage cases. (3) Examined copies of those inscriptions are admitted for the sake of convenience, the case forming an exception to the rule which admits copies only when the originals are public books. The admissibility of this evidence is

Inscriptions on  
tombstones.

on coffin  
plates.

case of the Berner's Barony, Collins on Baronies, 333. In *Monkton v. Attorney General*, 2 Russell & Mylne, 161, it was expressly held, that a pedigree was admissible, though not hung up or made public, on proof of its having been made by a member of the family. But it was considered by the Lord Chancellor, that where the pedigree is hung up, it is admissible, without proof of its having been made by the directions of the family, on the ground of being a family acknowledgment. Rings, and inscriptions on tombstones are considered by his Lordship as admissible on the same ground; and that the publicity of them supplies the defect of proof in not shewing that they were declarations made by members of the family. The pedigree admitted by the Lord Chancellor was founded on hearsay, and was in some respects erroneous, but these circumstances were not considered to affect its admissibility.

(1) Chandos peerage, printed minutes, p. 11. See *infra*, where the proper custody of documents is more particularly considered.

(2) Lord Mansfield, in *Goodright v. Moss*, Cowper, 594. Vin. Ab. Evidence, T. b. 87. 13 Ves. 144, 514. B. N. P. 233. 7 T. R. 3, n.

10 East, 120. *Duncomb Tr. per pais*, 424. 1 Lilly's Pract. Reg. 552. Sty. 208. Nicholas's Lisle Peerage, 50, 173. Peerage claims, *passim*. *Kidney v. Cockburn*, 2 Russell & Mylne, 171. *Ryder v. Malbone*, cited *ib.* when Little-dale, J., admitted an inscription on a tombstone, as stating the death of a party at a particular age. See also *Monkton v. Attorney General*, 2 Russell & Mylne, 163. With respect to the weight due to inscriptions on tombstones, much may depend on the circumstances, whether they are contemporaneous, and whether they are set up in the view of surviving relatives. It is to be observed, that this species of evidence often trenches on the rule which rejects secondary evidence; inasmuch as the authors of the evidence may be alive. In *Monkton v. Attorney General*, the Lord Chancellor considers tombstones on the same footing as rings, pedigrees hung up, and family Bibles, and as admissible on account of their publicity, without connecting them with the family.

(3) Chandos, printed minutes, p. 10. *Rokeby*, printed minutes, p. 4. *Lovat*, printed minutes, p. 77.

Monument in  
Dissenter's  
burying  
ground.

clearly not affected by the circumstance of the originals being in a church or churchyard. In the case of the Barony of Say and Sele, in 1781, part of the evidence for the petitioner was an inscription on a tombstone in the burying ground for Dissenters at Bunhill Fields; (1) and in a late case, Mr. Justice Park admitted, with some hesitation, an inscription on a tombstone in a Dissenter's burying ground, for the purpose of proving the death of a *cestui que vie*. (2) Where monuments have been decayed by time, or surreptitiously destroyed or removed, evidence of the recollection of witnesses respecting them, and as to the inscriptions they bore, has been admitted by the House of Lords. (3)

Mistakes on  
tombstones.

The credit of monumental inscriptions may always be impeached, and their evidence seems peculiarly open to attack, not only on account of the great facility of forgery, but also because the preparation of them is often committed to undertakers, executors, or other persons not members of the family, or because perhaps the inscription has been delayed till a period when the facts are but imperfectly remembered. In the claim of Katherine Bokenham to the Barony of Berners, an inscription, upon the tombstone of a person who was one of the links in the pedigree, was given in evidence; but it appeared from the entry of her burial in the parish register, and from her will, that there was a mistake of a year on the tombstone as to the time of her death; and the mistake is said to have arisen from a delay in laying down the stone. (4)

(1) Mr. Serjeant Hill's Collections in Linc. Inn Library, vol. 26, p. 173.

(2) Whittuck v. Waters, 4 Carr. & P. 376. There does not appear to be any ground for the judge's doubts upon this subject; as the admissibility of the inscription depends on a totally different principle from that of the admissibility of registers.

(3) In the Roscommon and Leigh peerage cases. The latter case turned wholly on the existence of a monument, alleged to have been surreptitiously removed from Stonely Church. Numerous witnesses

were examined for and against its existence. See the printed evidence, 1829.

(4) Collins on Baronies, 363, and note. There are several well known instances of similar mistakes. In the epitaph upon Spencer's monument in Westminster Abbey, there is a mis-statement as to the time of his birth of no less than forty years, and as to that of his death of three years; see Biog. Brit. nom. Spencer. The time of death is erroneously stated on the monument of Sterne; see Biography, prefixed to Works, ed. 1816; and the time of birth on that of Goldsmith, see



A mural inscription has been received in evidence, which gave an historical account of a family, and was placed in a chancel formerly used as the burial place of the family, and which was part of the church belonging to the parish where the family had long been landed proprietors; and in the same case, it was held, that although the inscription had been defaced twenty-four years ago, its contents might be proved by copies taken when the inscription was entire. The evidence was said to be admissible, as well upon the authority of the cases respecting tombstones, as of that respecting a pedigree hung up in a family mansion. (1)

Mural inscription.

Coat armour has sometimes been relied on in questions of pedigree. Lord Coke speaks of it's use to the bearers in "manifesting of what families they be;" (2) and Siderfin says, "arms serve to distinguish family from family, and to prevent branches of the same family interfering with one another." (3) Whilst the Heralds possessed and exercised the power of punishing usurpations, some credit may have been due to this evidence, probably on the ground, that, by the assumption of a particular bearing, the party must have meant to affirm, that he was connected in that manner with the family to which it belonged. The claim of Sir Michael Blount to the Barony of Mountjoy, in the time of Queen Elizabeth, turned almost wholly on the arms in a window at Iver, in Buckinghamshire, set up in the reign of Henry the Seventh; and elaborate arguments of the Heralds have been preserved, (4) as to the credit due to this evidence, in support of the claim of Sir Michael, as heir male of the body of Walter, first Lord Mountjoy, in con-

Coat armour.

Boswell's Johnson, vol. 3, p. 69, Oxford ed. 1826. In the *Lisle* case (Nicolas's *Lisle* peerage case, 89), a monumental inscription was produced in these terms, "To the memory of the Lady Katherine, late wife of Sir Richard Leveson, one of the daughters and co-heirs of Sir R. Dudley, Knight, son to Robert, late Earl of Leicester, by Alicia, his wife, daughter to Sir T. Leigh, of Stoneleigh, Knight and Baronet," which, it was observed,

was an ingenious device to represent to the cursory reader, that Sir R. Dudley was a legitimate son of the Earl of Leicester.

(1) *Slaney v. Wade*, 1 Mylne & Craig, 338. It would seem that the copies could only be evidences by way of refreshing the memory of the witnesses.

(2) Co. Litt. 27, a.

(3) 1 Sid. 354.

(4) Harl. MSS. 1386, 6141.

tradition to the books in the Herald's Office, which deduced his descent from Thomas, a brother of this Walter. In the modern case of the Barony of Chandos, where the claimant alleged, that he was descended from the third son of the first Lord Chandos, he was allowed to give in evidence the arms of his family in Herald's Visitation Books, and upon seals to deeds, delineations on parchment, and other family papers; which arms a Herald proved were those of the Chandos family, with the mark of the third branch. (1) An achievement with the same arms was likewise produced, which the mother of the claimant proved was hung up in the family mansion when she first married, and that she had heard her husband say, it had belonged to his grandfather. (2) In the Huntingdon Peerage case the Attorney General admitted in evidence an armorial shield, carved upon oak, which had been given by the late Earl of Huntingdon to the father of the petitioner. On this shield, which was produced from a family chest, were the arms of Stanley and Hastings quartered, in consequence, as it was supposed, of the marriage in the reign of James the First of Henry the Fifth, Earl of Huntingdon, with the daughter of Ferdinando Stanley, Earl of Derby. (3) So in support of the presumption of a marriage, evidence has been adduced that the husband impaled his wife's arms with his own on his plate, seals, and carriage. (4) It is observable, however, that the value, if not the admissibility of this evidence, depends upon its antiquity, and the Attorney General, therefore, in the Chandos Peerage case cross-examined the Herald, to shew that at the time, when it was proved that the achievement before mentioned was in the family of the claimant (about 1699), there was no authority in existence to correct usurpation. The year of the last Herald's Visitation (1686), seems to have been thought the time when this authority, or at least the exercise of it, ceased. (5)

Herald's books.

Armorial shield.

Carriage arms.

(1) Chandos peerage, printed minutes, pp. 6, 24, 37, 40, 49.

(2) *Ibid.* pp. 40, 49.

(3) Huntingdon peerage, by bill, p. 280. Atty. General's report, *ibid.* p. 359.

(4) *Hervey v. Hervey*, 2 W. Bl. 877.

(5) Chandos peerage, printed minute, p. 40. And see further as to the authority of the Herald's, *Russel's case*, 4 Mod. 128. *Oddis v. Domville*, Show. Ca. Parl. 66. *Blunt v. Blount*, 1 Atk. 295. As to the Earl Marshal's book, see

It may be convenient to mention, in treating of the subject of pedigree, (though it more properly belongs to the head of presumptive evidence), that the conduct of parties to each other, the disposition of property, the devolution of property and title, and similar circumstances, are frequently received in questions of pedigree, on the footing of declarations. They are properly facts, from which an inference as to the opinion and belief of families is drawn; and, therefore, they ultimately rest upon the same basis as hearsay evidence of family tradition. Chief Justice Mansfield, speaking of a father bringing up a son as legitimate, "this," he said, "amounts to a *daily assertion* that the son is legitimate." (1) And in *Goodright v. Saul*, (2) Ashurst, J., observes, that in that case "there were strong circumstances to shew that the son was a bastard; amongst others, a very forcible one occurred, namely, that the son had taken a different name from his birth, the name of the person with whom his mother was living at the time, which had been retained by him and his descendants ever since; this was a very strong *family recognition* of his illegitimacy." In the Leigh peerage case much stress was laid upon the alleged fact that an ancestor of the claimant, in indigent circumstances, had once paid a visit to Lord Leigh, which he used to boast of among his neighbours, and that his Lordship had given him a suit of clothing. (3) And in the Clinton peerage case, part of the evidence for the claimant was, that the sole descendant of an elder branch of the family, who died unmarried, had bequeathed several family pictures to a person who was the claimant's undoubted ancestor: and that the sole descendant of another elder branch had limited certain estates to the right heirs of his maternal grandfather, which estates were then in the possession of the claimant as such right heir. (4)

Conduct, &c. may be equivalent to declarations.

The separate weight which is due to this evidence was re-

Lisle peerage case, p. 12. With respect to the evidence of the Herald's books, *vide infra*, where the subject of public documents is more particularly considered.

(1) 4 Campb. 416.

(2) 4 T. R. 356.

(3) Printed minutes, p. 298, *et seq.*

(4) Claimant's case, Mr. Serjeant Hill's Collections, vol. 30, p. 331.

cognised in the case of *Beer v. Ward*. A deed was put in evidence by which certain estates were limited in remainder, by the owner to his grandson, (the person whose legitimacy was in question,) and the deed described him as if he were legitimate: Chief Justice Dallas said he was quite aware that besides the manner of describing him, there was an argument arising out of the disposition of the property. (1)

This kind of evidence is often material in raising the presumption of death without issue; the devolution of title or property upon a younger branch, especially after an express previous limitation to an elder, being relevant, though of course by no means conclusive, evidence of a failure of the issue of the latter. Thus, in the recent claim to the Earldom of Devon, it was shewn that property had been settled on the eldest son William in tail, remainder to the second son, Humphrey in tail, remainder to the third son, Peter in tail, and the death of Humphrey without issue was in part proved by an inquisition taken after the death of Peter, finding that he died seised of the lands so settled. (2) This occurred in the reigns of Richard 2nd and Henry 4th, after the statute *de donis*, and before the introduction of fines and recoveries, when it might be reasonably presumed that the land must have gone according to the settlement. For the same purpose similar evidence has been given of the devolution of property under the like circumstances in later periods, accompanied with proof of a search at the Warrant of Attorney Office, and at the King's Silver Office, to shew that no recovery was suffered or fine levied of the lands settled. (3)

In the case of the De Lisle peerage, part of the proof that Robert Dudley, Earl of Leicester, died without lawful issue, was that the right of presentation to an Hospital at Warwick, which had been given by the deed of foundation, after the Earl's death to his heirs, had been uniformly exercised from the

(1) Printed report of trial on first issue, pp. 39, 40.

(2) Nicolas's report of the case

of the earldom of Devon, App. p. 36.

(3) Chandos peerage, printed minutes, p. 11.

death of the Earl down to the last presentation by the collateral branch through which the petitioner claimed. (1) In the Banbury Peerage case, the illegitimacy of the claimant was principally established by inferences arising out of the conduct of the parties; as that the birth was concealed, and that the child took the name of Vaux; and that Lord Banbury accepted dignities from the King, and made a disposition of his property inconsistent with the idea of his knowing that he had any children. And, in the Gardiner Peerage case, where a great deal of evidence was adduced as to the conduct of the parties concerned, Lord Eldon says, that evidence of conduct, and of declarations connected with conduct, were to be considered, in order to come to a just determination upon the subject of that claim. (2)

There appears to be no objection, in questions of pedigree, to receiving hearsay in the second degree, when both degrees are within the family. Accordingly, it has been held, that the declarations of a deceased lady, that her first husband was accustomed to make certain statements respecting the pedigree of the family, were receivable in evidence. (3) And the same principle has been recently recognised in a case in Chancery. (4)

Declaration  
upon declaration.

Evidence of pedigree is frequently presented in other forms, and derived from other sources, besides those which have been enumerated, and particularly from public documents, as inquisitions *post mortem*, parish books, *parish and marriage registers*. But the admissibility of these documents and of Herald's books, which have been incidentally noticed, depends

(1) Nicolas's report of the case of the De Lisle Barony, pp. 50, 120, printed minutes of same, pp. 171, 197.

(2) See the speech of Copley, Attorney General, in the Gardiner peerage case, p. 285.

(3) Doe d. Futter v. Randall, 2 M. & P. 20. Per Best, C. J., *ib.* Though in the previous case of Johnson v. Lawson, 2 Bing. 88, Chief Justice Best observes, that

"hearsay too deep," or declarations upon declarations have never been received, although made by members of a family.

(4) Monkton v. Attorney General, 2 Russell & Mylne, 165. The case of Athol v. Ashburnham, B. N. P. 295, was cited as an authority for receiving declarations at second hand, or hearsay upon hearsay.

upon principles differing in some respects from those which have been treated of in the present section, and which require a separate consideration. (1) In the same part of the Work will be more conveniently considered the cases relative to various kinds of unauthorized registers containing evidence of pedigree.

Qualifications  
of hearsay in  
pedigree.

In matters then of pedigree, as defined by the preceding illustrations, hearsay evidence in the various forms that have been mentioned is receivable. But it remains to be stated under what qualifications it is received.

Requisite  
knowledge.

As to such qualifications, it is obvious that the value of this, as indeed of all hearsay evidence, must greatly depend upon the knowledge which the declarant possessed of the facts spoken to. It was long unsettled, whether any and what kind of connection, from which knowledge might be presumed, must have subsisted between the party making the declaration and those to whom it referred. Formerly there seems to have been no limitation to any particular class of persons, and evidence of the reputation of the country or neighbourhood, and of general tradition as to the facts of descent or relationship, was in some cases admitted. (2) Afterwards it was thought necessary that the hearsay should proceed from those whose connection with the family afforded them peculiar means of knowledge. "The

(1) *Vide infra*, where the subject of public and official documents is more particularly treated of. Parish books frequently afford evidence on matters of pedigree. Thus the date of Caxton's burial was fixed by a charge of twenty-pence for two torches and four tapers used at his funeral, entered in one of the parish books of St. Margaret's, Westminster.

(2) *Annesley v. Earl of Anglesea*, 17 How. St. Tr. 1160, 1195. Claim of Sir Michael Blount to the barony of Mountjoy, temp. Elizabeth, where "common fame" was relied on as evidence of his descent; and see as to general tradition, per Lord Mansfield, *Cowp.* 594; 2 W.

Bl. 1099; 14 East, 330. In the *Huntingdon peerage case*, the Attorney General admitted affidavits of persons resident in Leicestershire, as to the reputation of the county: Attorney General's report, *Hunt. Peer.* 359. According to the Scotch law, fame is admissible in questions of propinquity of blood: *Stair Inst. lib. 4, t. 42, s. 16*. And in the disputed election of Scotch Peers, 1790, the House of Lords admitted evidence, that it was the general belief of the country, that a claimant was lineal descendant and lawful heir male, and that he was "habite and reputed as such." Printed Minutes of Evidence, p. 136.

doctrine of Lord Mansfield (that tradition is sufficient evidence in point of pedigree, (1) ) must," said Lord Eldon, in the case of *Whitelocke v. Baker*, (2) "be understood as it has been practised and acted upon. The tradition must be from persons having such a connection with the family, that it is natural and likely, from their domestic habits and connections, that they are speaking the truth, and that they could not be mistaken." The nature of this connection was, however, undefined, though it does not appear to have been thought requisite that the declarant should be related to the family by blood or affinity. Upon several occasions at *nisi prius*, the declarations of servants, physicians, and intimate friends were admitted; (3) and the practice was countenanced by *obiter dicta* of Mr. Justice Buller, Lord Kenyon, and other Judges. (4) But at a later period, Lord Eldon speaks doubtfully upon the point; (5) and afterwards in the case of *Beer v. Ward*, Chief Justice Abbott received the declarations of servants and acquaintances, subject to further discussion, expressing at the same time an opinion against their admissibility. (6)

The question remained thus undecided, when it came before the Court of Common Pleas, in the case of *Johnson v. Lawson*, (7) upon a motion for a new trial, on account of the rejection by Mr. Baron Graham, of the declarations of a deceased house-keeper, that a certain person, under whom the plaintiff claimed, was the heir of her master. The Court were unanimous in

Limitation to  
relatives.

(1) Cowp. 594.

(2) 13 Ves. 514.

(3) *Duke of Athol v. Lord Ashburnham*, E. 14. Geo. 2. Bull. N. P. 290. Gilb. Evid. 112, S. C. (See a different statement of this case from a MS. of Mr. Wegg, in 2 Selw. N. P. 734, 5th edit., and 9 B. Moore, 192.) *Roe d. Bushell v. Gore*, Lancaster Summer Assizes, 1763, 9 B. Moore, 187, n. *Brown v. Shelley*, E. 1776, 9 B. Moore, 187, n. 190, cited by Mr. Justice Buller, 3 T. R. 719. *Walker v. Wingfield*, 18 Ves. 446.

(4) By Lord Kenyon and Mr. J.

Buller, in *Rex v. Eriwell*, 3 T. R. 719. Mr. J. Buller cites an authority for admitting declarations of persons not of the family. In *Weeks v. Sparke*, 1 M. & S. 679, Le Blanc says, that evidence of persons connected with the family is received. 13 Ves. 514.

(5) 18 Ves. 446.

(6) Printed report of trial, second issue, pp. 189, 192, cited 9 B. Moore, 188.

(7) 2 Bing. 86. 9 B. Moore, 183, S. C., and see *Whitelocke v. Baker*, 13 Ves. 514. *Goodright v. Moss*, Cowper, 594.

thinking the evidence properly rejected. Chief Justice Best in delivering judgment observed, that the admission of hearsay evidence in these questions must be subjected to some limits, otherwise great uncertainty would ensue. The limitation to the declarations of relatives or members of the family connected by blood or affinity, afforded a certain and intelligible rule; and if that were passed, it might be necessary, on every occasion, to enter into a long and almost endless inquiry as to the degree of intimacy or confidence which subsisted between the family and the party who had made the declaration. (1) In *Doe d. Sutton v. Ridgway*, the dying declaration of a servant of a family, upon matter of the family pedigree, was rejected. (2) And in *Crease v. Barret*, (3) it was said by the Court, that in cases of pedigree, the hearsay must be derived from relatives by blood, or from the husband with respect to his wife's relationship, and that it was not admissible if it proceeded from servants or friends. The case of *Johnson v. Lawson* was referred to as having established a clear and definite rule upon the subject.

Principle of  
limitation.

The principle upon which the declarations of relatives only are to be received, was pointed out in the case of *Vowles v. Young*, (4) Lord Erskine said, "the law resorts to the hearsay of relatives upon the principle of *interest* in the person from whom the descent is made out. The declaration is evidence from the interest of the person in knowing the connections of the family. Therefore the opinion of the neighbourhood of what passed among acquaintances will not do." (5) It must be observed, that the interest here spoken of is only an interest to acquire knowledge, and is clearly distinguishable from an interest to make any particular statement respecting the facts.

(1) 9 B. Moore, 188. The case of *Doe v. Deakin*, 4 Barn. & Ald. 433, does not impugn the doctrine in the text. A presumption of the death of a tenant for life was raised by the testimony of a living witness, who resided near the property, and who spoke to his continued absence from it. This

witness was not a member of the family. But he only proved facts within his own observation, and no question arose as to the admissibility of his declarations.

(2) 4 B. & Ald. 53.

(3) 1 Cr. M. & R. 928.

(4) 13 Ves. 140.

(5) 13 Ves. 147.



It seems to be chiefly upon this ground, that the declarations of a deceased husband as to the legitimacy or descent of his wife, are admissible, though he is not related to her by blood; (1) for, it was remarked, the husband has an interest in the succession of his wife to real property, because of it he might become tenant by the curtesy, as well as to personal property, to which he would be wholly entitled. (2) An objection is said to have been taken in one case, that the husband's declarations were inadmissible, because made after the death of the wife, when he was no longer connected with her family, but it was overruled upon the ground that his knowledge must have been acquired whilst he was married to her. (3)

Declarations of husband admissible.

Besides, however, the declarations of particular members of a family, the general reputation of the family is sometimes admitted upon questions of pedigree. Thus, in *Doe d. Banning v. Griffin*, (4) in order to prove a person to have died unmarried, a relative was allowed to state, that according to *the repute of the family*, he had died in the West Indies, and that she never heard, in the family, of his being married.

General reputation of the family.

It has been considered, that an instrument of pedigree, which, from the publicity given to it, must be presumed to have been adopted by the family, need not be traced to any particular member of it. Thus it has been observed, that an engraving upon a ring worn publicly, an entry in a Bible open to the family, an inscription upon a tombstone erected or supposed to be erected by the family and open to all mankind, a pedi-

Acknowledgment of family.

(1) *Vowles v. Young*, 13 Ves. 140. *Doe d. Northey v. Harvey*, 1 Ry. & Moody, 297. *Doe d. Futter v. Randall*, 2 Moore & Payne, 20.

(2) 13 Ves. 147.

(3) *Vowles v. Young*. This does not appear in the report in Vesey, but was stated by Burrough, J., who was counsel in the cause, 9 B. Moore, 194. That the declarations of a party connected by marriage are receivable; *Doe v. Randall*, 2 M. & P. 20. *Doe d. Nor-*

*they v. Harvey*, R. & M. 297. That a person need not be connected with both the branches of the family, touching which his declaration is tendered; see 2 Russell & Mylne, 156.

(4) 15 East, 294; and see B.N.P. 295. Stafford peerage case, printed evidence, p. 145. It may be questioned, whether this general repute of the family could be proved by others than members of it. B.N.P. 295.

gree hung up publicly in a family mansion, are all admissible in evidence, without knowing who may have been the authors of them. But in the absence of such publicity, they must be shown to have been made by some particular member of the family. (1)

Declaration of  
accoucheur or  
midwife.

The authority of the case of *Higham v. Ridgway* is open to much observation. It was decided by that case, that an entry made by an accoucheur in his book of having delivered a woman of a child on a certain day, the charge for which was marked "paid," was admissible as evidence of the birth of the child on that day, on the trial of an issue as to his age at the time of his afterwards suffering a recovery. (2) And an opinion was mentioned, in the course of the judgment, that such an entry, or the declaration of a midwife as to the time of birth, might be admissible, on the ground of having been made of a matter peculiarly within the knowledge of the declarant. (3) But the ground of the judgment seems to have been that the declaration was admissible, because the entry was against the interest of the accoucheur. (4) It is to be observed, that the rule which limits hearsay evidence in matters of pedigree to the declarations of relatives was not, at the time of the decision in question, established, nor had the principle of it been much considered. Neither was it brought before the notice of the Court that such evidence had been rejected in the Irish case of *Annesly v. the Earl of Anglesea*; in which case, the question was, whether the plaintiff was Lord Altham's legitimate son, and it became material to inquire whether Lady Altham ever had a child. To prove this, the declaration of a

(1) *Monkton v. Attorney General*, 2 Russell & Mylne, 162. In the Berkeley case of the family Bible, 4 Campb. 401, the handwriting was proved. *Vide supra*.

(2) *Higham v. Ridgway*, 10 East, 109.

(3) By Le Blanc, J., 10 East, 120.

(4) *Vide infra*, where the subject of declarations against interest is considered; and see the principle of the decision in *Higham v. Ridg-*

*way*, stated by B. Bayley, in 1 Cr. & J. 458. Lord Lyndhurst, C. B., in 1 Cr. & J. 456, observes, that none of the Judges in *Higham v. Ridgway*, put that case on the ground of pedigree. The case may also, perhaps, be supported, as an entry in the ordinary course of professional business, *vide infra*. The case of *Higham v. Ridgway*, is explained by Bayley, B., in *Glendow v. Atkin*, 1 Cr. & M. 428.

midwife that she had delivered Lady Altham of a child, was offered in evidence, but was held inadmissible. (1)

In the same case of *Annesley v. the Earl of Anglesea*, the declaration of a deceased lady, that she had stood godmother to the child of Lord Altham, was also after argument rejected. (2)

On a question of legitimacy depending upon the validity of a marriage, Lord Kenyon admitted evidence of a declaration by the clergyman, that a friend of the wife had forbidden the banns; but the evidence seems to have been received, on the ground of it's being a confession by the clergyman, that he had married the parties without the banns having been duly published. (3) And a clergyman's declaration as to the fact of marriage, when it was not against his interest, has been held inadmissible. This was in the case of the Berkeley peerage, where it being proposed to give in evidence declarations of a deceased clergyman, who was the domestic chaplain of the Earl of Berkeley when the claimant was born, that he had married the Earl of Berkeley and the claimant's mother in the parish church, of which he (the clergyman) was vicar, and also his declaration that the claimant was legitimate, the opinion of the Judges was taken on the admissibility of such evidence on the trial of an ejectment in the Courts below, and all the Judges present agreed that the evidence could not be admitted. (4)

Declaration of  
clergyman as  
to marriage.

(1) 17 How. St. Tr. 1157.

(2) 17 How. St. Tr. 1160.

(3) *Standen v. Standen*, 1 Peake, N. P. C. 34.

(4) Printed Minutes of Evidence, 1811, p. 655. Sir S. Romilly proposed to call Mrs. Tucker, to prove declarations made by the late Mr. Hupaman, first with respect to the legitimacy of the claimant; and secondly, as to his having performed the ceremony of a marriage between the late Earl and the Countess of Berkeley. Counsel being heard *pro* and *con*, the following question was put to the Judges:

"Upon the trial of an ejectment, in which it became necessary to prove the legitimacy of A. B., the plaintiff offered to give in evidence the declarations of a deceased clergyman, who was the domestic chaplain of A. B.'s reputed father at the time of A. B.'s birth, that he had married the reputed father and the mother of A. B. in the parish church of which such chaplain was vicar, and declarations that A. B. was the legitimate son of his reputed father. According to the practice of the Courts below, would such declarations as to the legiti-

Entry in Register.

Parish registers are not evidence of the time or place of birth. For as it is not the duty of the minister to register these matters, the register is not admissible, upon the principle hereafter to be considered, of being a public document, and, as private hearsay upon a matter of pedigree, it does not purport to be derived from the statements of relations. (1)

It appears then that in the cases, the authority of which has not been overruled, where the hearsay of strangers has been admitted, the declarations possessed some distinct ground of admissibility; and if the decision in *Johnson v. Lawson* is to be considered conclusive, it seems settled, that, on the footing of hearsay in questions of pedigree, the declarations of persons not relations are inadmissible, even though made respecting facts peculiarly within their knowledge, or under the most solemn circumstances. (2)

Reputation of strangers as to general relationship.

It has been thought, that notwithstanding the rule laid down for excluding declarations not made by relatives, the evidence of strangers as to general reputation is receivable in matters of pedigree; but that the evidence must be of a general nature, as, that A. was commonly reputed to be the son of B., or the father of C.; the same latitude not being allowed as in the

macy of A. B., or the fact of marriage be received in evidence?" The Lord Chief Baron delivered the unanimous opinion of the Judges present, that such declarations as to the legitimacy of A. B., or the fact of marriage would not be received in evidence.

(1) It would seem that proof would be required, that the statement of the minister was made by the direction of relatives; but, with this proof, that the evidence would be sufficient. It is also to be observed, that the evidence of baptism, connected with other evidence, may raise a presumption as to the time of birth. See *Withen v. Law*, 3 St. Ca. 63. *Rex v. Clapham*, 4 C. & P. 29. *Rex v. North Pether-*

ton, 5 B. & C. 508. It has been held, that a baptismal register, in which a party is described as the illegitimate son of his mother, is admissible evidence on the trial of an issue as to his illegitimacy. *Cope v. Cope*, 1 M. & Ro. 269. *Morris v. Davies*, 3 C. & P. 215, 427, which decisions seem not to be governed by the principle adopted in respect of an official statement in registers as to the time of birth. The time of marriage is an official statement. *Doe v. Barnes*, 1 M. & Ro. 389. *Vide infra*, where the evidence of parish registers is more particularly considered.

(2) See *Doe d. Sutton v. Ridgway*, 4 Barn. & Ald. 53, cited *supra*.

case of family declarations. There does not appear, however, to be any sufficient reason or authority for excepting such evidence, from the rule under consideration, (unless, indeed, the evidence frequently given of marriages be thought to be of this nature.) It is frequently said, that general reputation and the common opinion of the world are admissible in ordinary cases, to prove the fact of parties being married. But the evidence, usually produced in such cases, cannot be properly called hearsay evidence, as it consists of original evidence of facts or circumstances, as, evidence of the parties being received into society as man and wife, of respectable families in the neighbourhood having visited them, of the woman being churched after childbirth; all which circumstances show, that the parties demeaned themselves as if they were married, and were not living in a state of concubinage. Thus the ground of a presumption is afforded, that the parties were actually married. (1)

It has been decided, that before the declaration of a relative can be admitted in evidence, his relationship with the family must be proved *aliunde*, that is, it must be established by extrinsic proof, and not out of the declaration itself. Thus, in the Banbury peerage case, the Judges held, upon a question put to them by the House of Lords, that a bill in Chancery, purporting to be filed by the next friend of an infant, such next friend therein styling himself the uncle of the infant, and depositions in the same cause made by persons styling themselves relatives, servants, and medical attendants of the family, were not evidence, that the parties respectively sustained those cha-

Relationship of declarant to be proved *aliunde*.

(1) *Vide infra*, the chapter on *Presumptive Evidence*. See the summing up of Abbot, C. J., in *Beer v. Ward*, report of trial on second issue, pp. 294, 285. See also the case of Mr. Twisleton claiming the barony of Say and Sele, where, in proof of the marriage of his father and mother, he relied on the fact of their having been visited by C. J. Willes, and several families of respectability. Mr. Serjeant Hill's collection, vol. 26, p. 169. Read v. Passer, 1 Esp. 213. Leader v.

Barry, 1 Esp. 353. 1 Doug. 174. Herve v. Herve, 2 W. Bl. 877. Rex v. Bromley, 6 T. R. 330. Doe d. Fleming v. Fleming, 4 Bing. 266. 12 B. Moore, 500, S. C., where the proof of legitimacy depended on the fact of marriage, and where the father was alive. In Evans v. Morgan, 2 Cr. & J. 453, a witness stated, that he had heard that A. had married B., and it was held that this was sufficient *prima facie* evidence of a marriage.

racters, so as to let in such bill and depositions on the footing of declarations (supposing them to be in other respects admissible) in a case when the legitimacy of the infant was in question. (1) And in the late case of the Leigh peerage, where a witness proved that he had heard the declarant say, that he was a member of the family, the House of Lords ruled the evidence insufficient, holding that the relationship between the family and the party making the declaration must be first proved upon oath, and that a mere statement of the fact by the party himself was not evidence. (2) But where a person is connected with A. by evidence *dehors*, his declaration touching relationship between A. and B. is admissible, without connecting the declarant with B., otherwise the declaration would be manifestly superfluous, as only proving the very fact already established. (3)

Family acknowledgments presumed.

Where the instrument of pedigree depends for its effect

(1) 2 Selwyn's N.P. 754. By Lord Eldon, in the Berkeley case, 4 Campb. 419. The Banbury and Berkeley peerage cases upon this point were referred to by Mr. B. Bayley in *Davies v. Morgan*, 1 Cr. & J. 591, where it was held, that the character of the evidence must be established before an entry is read. In that case, however, the document did not describe the capacity of the person whose declaration was important. See *Adamthwaite v. Synge*, 1 Stark. C. 183, that the custody of records is not to be proved *ex visceribus judicii*. In *Doe d. Futter v. Randall*, Best, C. J., says, with reference to the facts of that case, "If there were no other evidence than the declarations of John to shew that James was a member of the family, they could not have been received; as that would be carrying the rule as to the admissibility of hearsay evidence further than has ever yet been done, and would allow a party to claim an alliance with a family by the bare assertion of it." In *Monkton v. Attorney General*, 2 Russ. & Mylne, 156, the Lord

Chancellor says, that "in order to admit hearsay evidence in pedigree, you must by evidence *dehors* the declarations, connect the person making them with the family. See also by Bayley, J., *Rex v. All Saints*, 7 P. & C. 788.

(2) Printed Minutes of Evidence, 1829, p. 307. It would seem, however, that in proving ancient pedigree, the rule which the authorities in the text appear to establish, would be too exclusive, as the relationship of the declarant with the family is often a fact of equal antiquity, and equally difficult to prove with the relationship, which is the subject of the declaration. And upon other matters it is very common to admit the declarations of copyholders, stewards, collectors, and persons in other capacities, upon the assumption that they stood in the situation in which, upon the face of particular instruments, they purport to stand. *Vide infra*, declarations respecting general rights; and Declarations against Interest.

(3) *Monkton v. Attorney General*, 2 Russ. & M. 157.

on family acknowledgments, (1) it has been seen that it need not be traced to any particular member of the family. Thus it has been said, that a charter of pedigree hung up in a family mansion need not be proved, by evidence *dehors*, to have been prepared or written by any member of the family; but that this would be necessary in the case of a pedigree not hung up, though found in the repository of one of the family, for want of that publicity which is requisite to establish its character as the subject of family acknowledgment. (2)

It is not necessary that the hearsay evidence, which is admitted upon questions of pedigree, should be contemporaneous with the facts to which the evidence relates. This would prevent the evidence from ever going back beyond the life-time of the person whose declaration is to be adduced in evidence. And the rule, if it were so limited, would not answer the exigency for which it was established. (3)

Hearsay not contemporaneous.

There are several other rules applicable to hearsay evidence in matters of pedigree. But as the like rules apply to the subject next to be considered, namely, that of hearsay statements upon matters of public or general rights, it will be convenient to postpone the consideration of them, in order that they may be illustrated by examples from both classes of cases. It will be sufficient to state, generally, in the present place, that hearsay declarations upon matters of pedigree are not receivable, unless made *ante litem motam*; but that it is no objection to them, that the persons making them were in *pari jure* with those who tender them in evidence.

Other rules of hearsay in cases of pedigree.

(1) *Supra*. p. 243.

(2) *Monkton v. Attorney General*, 2 Russ. & Mylne, 163.

(3) *Monkton v. Attorney Gene-*

*ral, ib.* where the example is put, that the declaration of a person as to the maiden name of his grandmother would be receivable.

## SECTION II.

*Hearsay Evidence upon Matters of public or general Interest.*

Hearsay admissible in matters of general interest.

Reasons for the exception.

Another subject, on which statements are receivable upon the credit of deceased persons who have neither been sworn to the truth of those statements, nor been cross-examined respecting them, relates to certain matters of public or general interest, of which the origin is in many cases, from their very nature, antecedent to the time of what is called *legal memory*, and, in the generality of instances, can be expected only to be found in times beyond the reach of living testimony. The same necessity, therefore, exists for resorting to hearsay evidence, as was pointed out in treating of pedigree. With respect to pedigree, indeed, one reason for admitting hearsay evidence of family incidents is, that a knowledge of them is confined to very few persons,—which cannot be said of public rights. But, it is to be observed, however generally known the origin of matters of public interest may once have been, their usual antiquity and the undefined generality of their nature render it more difficult to discover any testimony relating to them, not in the nature of hearsay, than where pedigree is the subject of inquiry.

It is proposed to follow the same course as was adopted in treating of pedigree, and in the first place to illustrate by examples the nature of matters of public and general interest; secondly, to treat of the forms in which such hearsay evidence is usually presented; and lastly, of the qualifications with which it is received.

Examples of matters of public or general interest.

On questions respecting a manorial custom, (1) a parochial modus, (2) a boundary between parishes or manors, (3) a custom

(1) *Denn v. Spray*, 1 T. R. 466, custom of descent. *Roe v. Parker*, 5 T. R. 26, 31. It is there said, that tradition and received opinion are evidence of the *lex loci*. *Doe d. Foster v. Jisson*, 12

East, 62.

(2) *Chapman v. Smith*, 3 Gwill. 854. 2 Ves. Sen. 512, S.C. *Harwood v. Sims*, 1 Wightw. 112.

(3) *Nicholls v. Parker*, 14 East, 331, n. 1 Maule & Selw. 81. *Steel*



of a corporation to exclude foreigners from trading within a town, (1) a right claimed by a corporation to collect tolls on a public road, (2) respecting the jurisdiction of a Court, whether it be or be not a Court of record, (3) and the like—in which the public are concerned, as having a community of interest from residing in the same neighbourhood, or being entitled to the same privileges, or being subject to the same liabilities,—common reputation and the declarations of deceased persons, asserting or disclaiming the right at issue, are admissible in evidence.

From the examples just mentioned, it will be seen that the term *public*, as applied to this subject, is not to be understood in its literal sense; it has been defined to be synonymous with *general*, that is, what concerns a multitude of persons. (4) The leading authority upon this subject is the case of *Weeks v. Sparke*, (5) which was an action for a trespass on the plaintiff's close, parcel of a common, &c.; the defendant justified for a prescriptive right of common at all times over the place, and the plaintiff in his replication prescribed to use the place

General rights.

*v. Pricket*, 2 Stark. C. 466. *Plaxton v. Dare*, 10 Barn. & Cress. 17. *Coombs v. Coether*, 1 Mo. & Mal. 398. *Barnes v. Mawson*, 1 Maule & Selw. 81, boundary of the new land within a manor.

(1) *Davies v. Morgan*, 1 Crompt. & Jerv. 593.

(2) *Brett v. Beales*, 1 Mo. & Mal. 416. *City of London v. Clarke*, Carth. 181. B. N. P. 233.

(3) *Braine v. Dew*, 2 Peake, N. P. C. 204. *Rogers v. Wood*, 2 Bafn. & Adolph. 245.

(4) Per Bayley, J., 1 Maule & Selw. 690, and see *Crease v. Barrett*, 1 Cr. M. & R. 931.

(5) 1 Maule & Selw. 679. It has been questioned whether evidence of reputation be receivable upon a trial concerning the liability of an individual to repair a public bridge *ratione tenure*. Case of Kelham bridge, tried at Lincoln, Spr. Ass. A. D. 1832. There is a dictum of Mr. J. Patteson in *Rex*

*v. Antrobus*, 2 Ad. & Ellis, 794, against the admission of hearsay in such a case. In the case of the *City of London v. Clarke*, Carth. 181, evidence of verdicts was received in a matter affecting only the interests of the owners of west country barges. And see *Chapman v. Cowlan*, 13 East, 8, as to evidence of reputation upon a question of a prescriptive right affecting all the copyholders of a manor. The existence of a manor may be proved by reputation, as by a description in an old deed: *Curzon v. Lomax*, 5 Esp. 60. *Steel v. Pricket*, 2 St. 466. Evidence of reputation is admissible in the case of tolls: *Brett v. Beales*, 1 Mo. & M. 416, though the right is claimed by grant or prescription. Lord Kenyon appears to have alluded to cases of this description in *Reed v. Jackson*, 1 East, 356, where he speaks of "public prescription."

for tillage, &c., qualifying the defendant's general right. To support this prescriptive right of tillage, the plaintiff offered evidence of reputation, which was received at the trial; and the Court of King's Bench were of opinion, that it had been properly admitted, on the ground that the right claimed by the plaintiff, although claimed by prescription, was yet an abridgment of the general right of common over the waste, and affected a large number of occupiers within the district. Mr. Justice Bayley, in delivering his judgment in this case, says, "I take it that where the term public right is used, it does not mean *public* in the literal sense, but is synonymous with *general*; that is, what concerns a multitude of persons, now this is a general right, exercised by a variety of persons, though not a public right of common." And Mr. Justice Dampier observes, that "it is not to be disputed, that in public rights, reputation is admissible; and the rule has been extended to other rights which cannot be strictly called public, such as manors, parishes, and a modus. A modus is, strictly speaking, a private right, but it has been considered as public, so far as regards the admissibility of this species of evidence, because it affects a large number of occupiers within a district. Here the right claimed goes to abridge the rights of all the persons concerned over a large district of common: and, therefore, I think evidence of reputation is admissible." (1)

District modus.

In the case of *Rudd v. Wright* (2) in a motion for a new

(1) Hearsay evidence is also admissible upon matters of general history. This subject will be considered in Sect. I., upon *Public Documentary Evidence*, where books of history are noticed. Upon a custom in restraint of trade: *Davies v. Morgan*, 1 Tyrw. 457.

(2) Before Lord Lyndhurst in *Equity Ex.* 11 July, 1832. On the admission of hearsay evidence to prove moduses, see *Robinson v. Williamson*, 9 Pr. 136, per Dampier, J., in *Weeks v. Spark*, *supra*, p. 252. *Williamson v. Thompson*, 9 Pr. 186, a township modus. *Doninson v. Elaley*, 1 M'Clel. & Y.

1. A modus for a district consisting of 274 acres. That there is no difference between a modus and any other prescription in lieu of tithes, per Wood, B., 4 Pr. 19. In *Chapman v. Smith*, 2 Ves. Sen. 506, the Lord Chancellor considered that tradition respecting a modus as applicable to the "marsh lands" of a parish would be receivable. In *White v. Lisle*, 4 Madd. 214, in the case of a farm modus, the Vice Chancellor said, that reputation was admissible in cases of private right where a class or district of persons was concerned.

trial, on an issue from the Court of Exchequer, to try the validity of a modus, which was claimed in respect of a district, (not being a legal division of the country, as a hundred, parish, vill, or hamlet,) Lord Lyndhurst was of opinion, that evidence of reputation in favour of the modus was properly received on the trial, upon the authority of the case of *Weeks v. Sparke*; (1) the district comprising a great number of farms, and extending over more than two thousand acres, and the questions involving and applying to a great number of persons.

Whether evidence of reputation be admissible upon a question of a farm modus, appears to be a point not perfectly settled. It has been generally understood in the Exchequer, that the evidence is inadmissible. (2) In an ancient case, it was received; and also in some modern cases, where however the point was not much considered. (3)

Farm modus.

Upon the admissibility of hearsay evidence as proof of prescriptive rights strictly private, and not affecting any public or general interest, there has been considerable difference of opinion. The Court of King's Bench was equally divided upon the point in the case of *Morewood v. Wood*, (4) where

Hearsay in private rights

(1) *Supra*.

(2) Per Lord Lyndhurst in *Wright v. Rudd*, *ubi supra*. But his Lordship stated that he was willing to hear the question argued. In *Wells v. Jesus College*, 7 C. & P. 284, reputation concerning a farm modus appears to have been rejected. It is to be observed, that an exemption from the liability to which the rest of the parish was subject, would be likely to create general observation and remark.

(3) *Webb v. Potts*, Noy. 44. In *White v. Lisle*, 4 Madd. 214, this case was said to stand alone, and to be too loose to be relied on. The Vice Chancellor added, that there was no necessity to resort to evidence of reputation in the case of a farm modus, because proof of a fixed payment for a long period was evidence of a modus. The same

argument would, however, apply to parochial moduses, and other customary payments, where reputation is clearly admissible. In *Doninson v. Elsley*, 3 Eag. & Y., tithe cases, 1396, n., evidence of reputation in the case of a farm modus was read *de bene esse*, and similar evidence appears to have been received in *Wooley v. Brownhill*, 1 M'Clel. 317. In *Bullen v. Mitchel*, 4 Dow. P. C., which related to a farm modus, much documentary evidence was adduced, and was treated as evidence of reputation; but most of the documents were of a public nature. In *Eagle on Tithes*, vol 2, p. 439, there is a learned argument, to prove that evidence of reputation is inadmissible upon questions of farm moduses.

(4) 14 East, 327. Lord Kenyon, C. J., and Ashurst, J., against the

the question related to a prescriptive right, annexed to a particular estate, of digging stones on a waste. And a book of authority lays it down broadly, that in questions of prescription it is allowable to give hearsay evidence, in order to prove general reputation, and that therefore where the issue was on a right of way over the plaintiff's close, the defendants were admitted to give evidence of a conversation between persons not interested, then dead, wherein the right to the way was acknowledged. (1)

Private prescriptive rights.

But there are many great authorities on the other side. (2)

evidence; Buller, J., and Grose, J., for it. It did not appear whether the prescriptive right claimed was in derogation of the rights of common in the copyholders; in which case it would seem that evidence of reputation was admissible. *Weeks v. Sparke*, 1 Maule & Selw. 679.

(1) Bull. N. P. 295, citing *Skinner v. Lord Bellamont*, Worcester, 1744. And see the opinions of Buller, J., and Grose, J., in *Morewood v. Wood*, 14 East, 330, n.; also Grose, J., 3 T. R. 709. In *Price v. Littlewood*, 3 Camp. 288, Lord Ellenborough admitted proof of entries in a parish book, as evidence of the reputation of the parish respecting the private right of pew. But he also assigned as a reason for admitting the evidence, that the entries were made by churchwardens, upon a subject within the scope of their official authority. It may be observed, that the right in question affected the general rights of parishioners. In *Davies v. Lewis*, 2 Chitt. 538, hearsay evidence was admitted in a question of private right, as to the point whether a particular place was parcel of a sheep-walk. But the case was compromised and not much argued. In *Weeks v. Sparke*, 1 Maule & Selw. 690, there is an *obiter dictum* of Mr. Justice Bayley, that "in cases of prescription, which must have originated beyond the time of legal memory, and of which it is impossible to establish the claim by evidence of the grant, reputation seems to be admissible."

In *Barnes v. Mawson*, 1 Maule & Selw. 77, evidence of reputation was received as to what was new land within a manor. In *Rogers v. Allen*, 1 Camp. 310, judgments were admitted in a case of prescriptive right. But the evidence was in the nature of acts of possession, and the like observations may apply to the evidence of court rolls, and the judgment and allowances in Eyre, in *Biddulph v. Ather*, 2 Wils. 23. In *Williams v. Goodchild*, Nov. 23, 1824, 2 Eagle on Tithes, p. 440, Leach, V. C., allowed as evidence in support of an exemption from tithes, claimed for a particular estate, a catalogue, and particulars of sale, and also a map. The Vice Chancellor said, that every fact which is to be carried beyond time of memory may be proved as matter of reputation, on account of the principle, that it is impossible to bring direct evidence as to such a fact. In *Ansombe v. Shore*, 1 Taunt. 262, the right was prescriptive, but it would seem that it affected a matter of general interest to commoners. In 2 Roll. Ab. 186, pl. 5, tit. *Prerogative*, it is said to have been held that declarations as to whether certain land was parcel of a manor or of an estate were admissible as between subjects, but not as against the crown.

(2) Lord Kenyon and Ashurst, J., in *Morewood v. Wood*, 14 East, 329, n. Lord Kenyon, C. J., in *Reed v. Jackson*, 1 East, 357. In *Blackett v. Lowes*, 2 Maule & Sel. 500, where evidence of reputation was tendered

It is to be observed, that the receiving of hearsay evidence is founded on a principle of necessity, in consequence of the antiquity frequently belonging to particular inquiries, and that, although a custom must necessarily be immemorial, it is assuming the question in dispute, to say that a private right of way, or common, and the like, is prescriptive and immemorial. Even supposing a private right to have necessarily originated, if at all, before the reign of Richard I., yet it may reasonably be expected, that in the instance of any private right, the case should be sufficiently established by modern use without recourse to evidence of reputation; whereas a greater latitude may be allowed in the instance of public rights, which it is not the interest of any individual in particular to guard from encroachment. (1)

Where the title to a private right is not prescriptive, the principles, upon which evidence of reputation is admitted, seem more completely to fail; it cannot be said, in the generality of such cases, there is a necessity for resorting to hearsay testimony. The authorities confirm this opinion. Although evidence of reputation is received of the boundaries of parishes or manors, which are generally of remote antiquity, such evidence has been held to be inadmissible for the purpose

Private boundary.

as to the right of the tenants of a particular copyhold estate to cut and sell wood, Lord Ellenborough said, that reputation was out of the question, *because the tenants' right could only arise by some grant or deed*; yet, it has been seen that reputation is evidence of tolls; Brett v. Beales, 1 Mo. & M. 416. In Richards v. Bassett, 10 Barn. & Cress. 663, Littledale, J., said, that it was by no means clear that evidence of reputation was admissible in matters of prescriptive right. And he thought it was not admissible to determine whether an individual had a right to the soil itself, or only a right of common over it. In Weeks v. Sparke, 1 Maule & Selw. 691, Dampier, J., intimates, that reputation would not be evidence of a pri-

vate right of way over a particular field. In Reed v. Jackson, 1 East, 356, Lord Kenyon appears to confine the admissibility of evidence of reputation to cases of public prescription. In White v. Lisle, 4 Madd. 214, the Vice Chancellor said, that in late times evidence of reputation had not been tendered in cases of prescription as to individual rights, except as to rights of way.

(1) Another, and perhaps the principal objection to the evidence of reputation in matters of private right, arises from want of knowledge in the declarants. This objection will be considered, in treating of the qualifications under which hearsay evidence is receivable.

of proving the boundary of a private estate. (1) The boundaries of private estates are as likely to have been of recent as of ancient date.

Private title.

The objection to receiving hearsay testimony upon matters of private right, applies with still greater force to those cases which are unsupported by any analogy to matters of public or general interest; as, where the fact sought to be proved is not matter of prescription or of boundary. Thus, in an ejectment, where the lessor of the plaintiff claimed the land as tenant in tail under a will, by which the testator gave his son an estate for life, and the defendant claimed as devisee of the son, the question was, whether the land in dispute was part of the entailed estate, or had been purchased by the son; evidence of reputation, that the land had belonged to Sir J. S. and had been purchased of him by the father, the first testator, was held to be clearly inadmissible. (2)

In *Rex v. Antrobus*, (3) on the trial of an information against a sheriff of a county, for not executing a convict sentenced to death, it has been held, that a witness could not be asked, whether he had heard that it was the custom for the sheriff to be exempt from performing, or for another person to perform, the duty in that particular county, although it had been proved that such other officer had in fact always performed it within living memory. It was said, that this was

(1) *Clothier v. Chapman*, 14 East, 331, n. But in *Davies v. Lewis*, *supra*, p. 254, n., such evidence was thought admissible upon a question of private boundary. In *Donnison v. Elsley*, 3 Eag. & Y. tithe cases, 1396, the evidence of a witness as to the extent, boundaries, and parcels of an estate, whose information was derived from hearsay and from a map and plan, was rejected.

(2) *Doe d. Dodsbury v. Thomas*, 14 East, 323. In this case the evidence may, perhaps, be thought

objectionable also as relating merely to a particular fact. The same may be observed in the case of *Outram v. Morewood*, 5 T. R. 123. In *Withnell v. Gartham*, 1 Esp. 322. Lord Kenyon rejected traditionary evidence of usage in electing a schoolmaster, as it related to private right. In *Blackett v. Lewes*, 1 M. & S. 500, reputation of what must have arisen by private grant from a lord to his copyholders was rejected.

(3) 2 Ad. & Ellis, 794.

not a matter of public interest, the public not being interested in the question which officer was to perform the duty.

It has been said, that in the case of the *Bishop of Meath v. Lord Belfield*, (1) in a *quare impedit*, after the plaintiff had given in evidence an entry in the register of the diocese, of the institution of one K. (in which entry there was a blank, where the patron's name was usually inserted), parol evidence of the general reputation of the country was offered, that K. was in by the presentation of one, under whom Lord Belfield claimed; and, that, on a bill of exceptions the evidence was adjudged to be admissible, on the ground that a presentation may be by parol, and that what commences by parol may be transmitted to posterity by parol; and that this creates a general reputation. But Lord Kenyon, adverting to this case, in the case of *King v. Eriswell*, (2) said, he admitted that a presentation might be by parol, and might be proved by parol, that is, by a witness who was present and heard it; but he denied, that in such a case, common reputation could be given in evidence. If it can, he added, why might not such evidence decide titles to estates, at least before the statute of frauds, when no written instrument was required to make a good feoffment of the greatest landed property in the kingdom.

In *ejectione firmæ* for a rectory, after the plaintiff had proved presentation, admission, institution, induction, and the reading of the articles, the defendant's counsel insisting that he should prove that he was in orders, Lord Holt admitted evidence of reputation as to the fact, saying, the same proof would be allowed to prove orders as to prove marriage. (3)

(1) Bull. N. P. 295, cited by Buller J., in *Rex v. Eriswell*, 3 T. R. 719. S. C. reported 1 Wils. 215.

(2) 3 T. R. 723. *Tellard v. Shebbeare*, 2 Wils. 366.

(3) *Harscot's case*, Comb. 902. Perhaps, however, this decision may be supported with greater propriety on the principle of presumptions, *vide infra*. The case seems to fall within a general rule of the civil law, that fame should be ad-

mitted to prove whatever concerned the *status* of man. Before the distinction of lay and clerical arose, there were but three questions concerning the *status* of men: first, *de statu libertatis*; secondly, *de statu civitatis*; thirdly, *de statu familiæ*; and by the old Roman law, the same process was applicable to each. Heinecc. *Antiq. Rom. Synt. lib. iv. tit. 6, s. 30*. The three questions are neatly brought

Particular  
facts.

It is laid down by many authorities, that hearsay evidence of *particular facts* is not admissible. (1) There seems to be no adequate necessity for admitting hearsay evidence to establish facts, which are not likely from their nature to be the subject of general remark, merely because they may conduce to the proof of matters upon which evidence of reputation is admissible, or merely because, in the particular instance, they are of considerable antiquity. However, it would seem that some particular facts, at least, might not improperly be the subject of traditional evidence. In matters of pedigree, the hearsay evidence relates almost entirely to particular facts; (2) but the facts are of that nature which make a strong impression, and which, in a number of instances sufficient to warrant a general rule, are incapable of proof by living testimony. It has been observed, that particular facts, in general, are not matters of notoriety, that they are easily misunderstood or misrepresented, and that they are commonly connected with other facts by which their effect ought to be explained and limited.

On a question of parochial modus, hearsay evidence that a particular person, since deceased, paid a certain sum in lieu of tithes, would not be admissible: but if the witness says, he has heard from old inhabitants, that so much per acre was always paid in lieu of tithes, or that it had always been the custom to make such payments, that will be good evidence, for it does not consist of hearsay of a particular fact, but comes within the general rule of evidence of reputation. (3) But

together by Terence. CH. "Principio eam dico esse liberam." THR. "Hem?" CH. "Civem atticam." THR. "Hui?" CH. "Meam sororem." THR. "Os durum!" Eunuch. iv. 7, v. 35.

(1) Per Grose J., 3 T. R. 709. Per Lord Kenyon, C. J., 5 T. R. 123. Per Wood, Baron, Moseley v. Davies, 11 Pr. 162. Chatfield v. Fryer, 1 Price, 253. Garnons v. Bernard, 1 Anstr. 298. By Chief Justice Mansfield, in the Berkeley case, 4 Campb. 415. Outram v. Morewood, per Lord Kenyon, 14 East, 330, n. Nichols v. Parker, 14 East, 331, n. Cooke v. Banks,

2 C. & P. 481. In several of the cases, where this general rule has been laid down, the particular fact in question had no connection with the exercise of any public right, or the performance of any public duty, and was not in itself an object of notoriety.

(2) Per Mansfield, C. J., in the Berkeley case, 4 Camp. 416.

(3) Harwood v. Sims, 1 Wightw. 113. Per Macdonald, C. B., "the essence of reputation is, that if you prove a fact, as for instance, payment of a sum of money, it must be accompanied with this, that it was so paid in consequence of a



though hearsay of a custom to make particular payments is evidence, hearsay that certain lands were formerly given to the vicar in lieu of tithes is not admissible; (1) this being evidence of a particular fact, and being confined to a particular occasion. Again, though reputation is good evidence of the boundaries of a town, it is not admissible to prove that houses once stood where now there are none. (2)

Upon a question whether a part of Lincoln's Inn was part of the parish of St. Andrew Holborn, an ancient book of antiquities, relative to the parish and collected by a churchwarden, was produced, and several entries were tendered in evidence concerning the repairs of pews, and the glazing of windows. But Lord Tenterden refused to receive this evidence, as it related only to particular facts. (3)

Perambulations, although they consist of particular acts done, as the making of an ambit, digging turves, and putting down posts at particular places, and although they give rise to much hearsay evidence, are, properly speaking, only the exercise of a right. It is, however, usual and perfectly consistent with principle, to admit what old persons, deceased, who accompanied the perambulations, were heard to say on such occasions;

reputation. If evidence is confined to the fact of payment, it is inadmissible, unless the tradition that came with it was a reputation that that had always been the case." And see *Wood, B., in Mosely v. Davies*, 11 Pr. 162, that the evidence should always be general. And see *Wells v. Jesus College, Oxford*, 7 C. & P. 284, statement of an occupier as to the fact of payment of a modus.

(1) *Chatfield v. Fryer*, 1 Pr. 253. And see *Leathes v. Newel*, 4 Pr. 355, 8 Pr. 562; evidence of reputation of certain lands having been inclosed, in pursuance of an agreement, rejected. In *Crease v. Barrett*, 1 Cr. M. & R. 919, is another example of hearsay evidence of a particular fact being rejected.

(2) *Ireland v. Powell, Peake's Ev.* 14, cited 1 Pr. 256. The cir-

cumstance that the reputation related, to particular facts was an objection to it's admissibility, in addition to the objection that the matter was not of public interest. As in *Doe v. Thomas*, 14 East, 323, where the reputation was, that the land had belonged to I. S. and was of A. B.

(3) *Cooke v. Banks*, 2 Carr. & P. 481. Lord Tenterden stated that evidence of particular facts was not receivable, unless the party charged himself; the question of the book being a public book or not does not appear to have been much considered. In *Price v. Littlewood*, 3 Camp. 289, similar entries appear to have been admitted; but, the question related to a right of pew; and the nature of the book was assigned as one of the grounds of it's admission.

though there does not appear to be any authority for admitting hearsay as to particular facts conducive to the proof of the boundary, even though it be delivered on the occasion of a perambulation. Lord Ellenborough observes upon the subject of perambulations, that they are in the nature of hearsay evidence not of particular acts done, as that such a turf was dug, or such a post put down in a particular spot; for that would amount to evidence of ownership; but they are evidence of the ambit of any particular plan or parish, and of what the persons accompanying the survey have been heard to say and seen to do on such occasions. (1) And Le Blanc, J., observes, in the same case, that the evidence of perambulations might be considered, in a certain degree, as evidence of the exercise of a right, yet that it had been usual to go further, and admit the evidence of what old persons, who are deceased, have been heard to say on those occasions. In a late case, perambulations by a lord, of what he considered to be his manor, made in the absence of the party affected by them, were received, as shewing a claim of right and act of ownership, though slight in its effect; (2) a principle obviously distinct from that at present under consideration.

**Forms of evidence.**

In the next place, according to the course adopted in treating of pedigree, it is proposed to consider the different forms in which evidence of reputation, upon matters of public or general interest, is usually presented to the Courts.

**Documents.**

Reputation respecting public rights may be shewn by old deeds or other documents, as well as by the oral declarations of deceased individuals. (3) Thus, where the question was, whether certain land was in the parish of A., or in that of

(1) In *Weeks v. Sparke*, 1 Maule & Selw. 687, 689. It is to be observed, that perambulations are actually attended by a great number of strangers, as well as by official persons, commonly called the spadesmen. Perhaps in giving evidence of the declaration of perambulators, it would be presumed that they were made by persons conver-

sant with the boundary in question. And the occasion of the declaration might be considered as giving them weight.

(2) *Woolway v. Rowe*, 1 A. & E. 118.

(3) This subject will receive further illustration in the part of the work which treats of public documents.

B., the land in the latter being tithe-free, ancient leases granted by the ancestors of the plaintiff's landlord, in which the land was described as being in parish B., were held admissible as evidence of reputation, notwithstanding that such ancestor had a direct interest in describing the land to be situate in that parish. (1)

Leases.

In the case of the *Cambridge Tolls*, a composition deed between the Corporation of Cambridge and the University, regulating the amount of payment of tolls, was received as evidence of reputation of the existence of the tolls. (2) So depositions in ancient suits have frequently been produced to prove reputation. (3)

Composition deed.

A customary of a manor delivered down with the Court Rolls, from steward to steward, and purporting to be *ex assensu omnium tenentium*, although not signed by any person, has been held to be good evidence to prove the course of descent within a manor. (4) So the presentment of a custom of a manor by the homage, entered on the rolls of the manor, is receivable. (5) In *Crease v. Barrett*, ancient answers of

Manorial documents.

(1) *Plaxton v. Dare*, 10 Barn. & Cress. 17. For other instances of similar evidence being received, *Arundell v. Lord Falmouth*, 2 Maule & Selw. 443. *Freeman v. Phillips*, 4 Maule & Selw. 486. *Coombs v. Coethier*, 1 Moo. & Mal. 398.

(2) *Brett v. Beales*, 1 Mo. & Mal. 416. It appeared that the deed had not been exactly followed in practice; but it was held that this objection did not apply to its admissibility.

(3) *Freeman v. Phillips*, 4 Maule & Selw. 493, and the cases of the *Settle* and *Leeds Mills* cited by Lord Ellenborough, *ib.* In *Pollard v. Scott*, Peake, 18, upon a question of highway, Lord Kenyon rejected the evidence of a copperplate map, purporting to have been taken by the churchwardens at the time. But there does not

appear to be any valid objection to such evidence.

(4) *Denn v. Spray*, 1 T. R. 466. When the instrument containing evidence of reputation is found among the muniments of a manor, the reputation may perhaps be considered as deriving some additional force in the nature of an admission, in consequence of the privity of copyholders, and their access to the instrument in question.

(5) *Roe v. Parker*, 5 T. R. 26; and see *ib.* Lord Kenyon's remarks as to the credit due to such presentments. In *Arundell v. Lord Falmouth*, 2 Maule & Selw. 441, presentments by the homage were given in evidence. In *Curzon v. Lomax*, 5 Esp. 60, an old deed describing a place as a manor was given in evidence. In *Barnes v. Mawson*, 1 Maule & Selw. 79,

conventional tenants of a manor, stating the rights of the lord of the manor, and made to interrogatories put to them by commissioners, but which interrogatories were lost, were received in evidence. (1)

So in an action by a copyholder against a freeholder of the manor for the disturbance of the plaintiff's right of common, by reason of the defendant purchasing the common, (the plaintiff setting up a restricted right), parchment writings produced on the part of the defendant from amongst the muniments of the manor, purporting to be signed by many persons copyholders, and stating an unlimited right of common in the commoners, which having been found inconvenient, they had agreed to stock it in a restricted manner, were held admissible as evidence of reputation as to the general right at that period, and in disproof that the restricted right originated in prescription; there being no evidence that the plaintiff's tenement belonged to any of those who had signed the writings, so as to render them admissible against him on that ground. (2)

#### Maps.

It would seem that maps, stating the boundaries of manors or parishes, would be receivable in evidence to prove such boundaries, provided it appeared that they had been made by persons having adequate knowledge. In the cases, however, where maps have been admitted in evidence, their admissibility has depended on the ground of their being public documents, or of their being in the nature of admissions. Where they relate merely to the boundaries of private property, there is no ground for receiving them, however ancient. (3)

leases of the lord of a manor, and entries of payments and conveyances on the Court Rolls, were received. As to leases, *vide* *Clarkson v. Woodhouse*, 5 T. R. 412, n. 3 Doug. 189. In *Bullen v. Michel*, 4 Dow. P. C. 297, leases are spoken of as evidence of reputation.

(1) 1 Cr. M. & R. 923.

(2) *Chapman v. Cowlan*, 13 East, 8.

(3) In *Pollard v. Smith*, Peake,

18, such evidence appears to have been rejected upon a question of highway. With respect to private maps, see *Doe v. Laken*, 7 C. & P. 481, *Sir J. Bridgeman v. Jennings*, 1 Lord Raym. 734. *Donaldson v. Elsley*, 2 Eagle & Y. 1396, n. *Infra* ch. on Admissions. In *Alcock v. Cook*, before Tindal, C. J., at Guildhall, maps of the duchy of Lancaster were received as public documents.

It has been held, upon a question of public or general interest, that a verdict is receivable evidence of reputation. As in the case of *Reed v. Jackson*, (1) where, in an action of trespass, issue was joined on a plea of public right of way, the plaintiff was allowed to give in evidence a verdict found in his favour against a different defendant, upon an issue joined as to the existence of the same right of way. And in an earlier case, where the question discussed was concerning the right of the City of London to take certain tolls upon malt brought to London by west country barges, it was held, that verdicts against certain owners of barges were admissible in evidence against other owners who were neither parties nor privies to the former records. (2) The like evidence has been received upon a question respecting the right of electing churchwardens. (3) And the admissibility of verdicts, in cases where evidence of reputation is receivable, seems to be fully established by the authorities relating to the competency of witnesses to give evidence in proof of customs, from the establishment of which they might themselves derive a benefit. (4)

(1) 1 East, 356.

(2) *City of London v. Clerke*, Carth. 181. B. N. P. 233, where it is said, that custom or toll is *lex loci*, and in such cases it is not material whether the verdicts be recent or ancient. For other cases see *Cost v. Birkbeck*, 1 Doug. 218, case of *Settle Mills*, where a verdict and a decree were given in evidence. And the case of the *Manchester Mills*, 1 Doug. 221, n., where a decree was given in evidence. *Duke of Somerset v. France*, 1 Str. 659. In *Clarkson v. Woodhouse*, 5 T. R. 412, a decree, it would seem, was left to the jury upon a matter of reputation. In *Travis v. Chaloner*, 2 Eas. & Y. tithe cases, it was held, that upon a question of modus, a verdict between the parson and another occupier was admissible evidence. In *Biddulph v. Ather*, 2 Wils. 23, on a question of prescriptive right of wreck, a judgment and allowances in Eyre were proved.

(3) *Berry v. Banner, Peake*, 157.

(4.) B. N. P. 283, and see *ib.*, a distinction in this respect between customs and prescriptions. Per Lord Kenyon, C. J., in *Bent v. Baker*, 3 T. R. 33, where the like distinction is noticed. Per Ashurst, J., in *Walton v. Shelley*, 1 T. R. 302. *Company of Carpenters v. Hayward*, 1 Doug. 374. *Hockley v. Lamb*, 1 Lord Raym. 731. *Lord Falmouth v. George*, 5 Bing. 291. *Rhodes v. Ainsworth*, 1 B. & Ald. 87. In *Lancam v. Lovell*, 9 Bing. 467, the same principle was recognised, only the witness was admitted *ex necessitate*, as the right affected the whole public. And see the cases cited, *ib.* Upon questions of moduses, the occupiers of lands within the parish or district, for which the modus is claimed have been considered before the statute, as incompetent witnesses, *Lord Clarrickard v. Denton*, 1 Eas. & Y. 306. *Cart v. Hodgkin*, 2 Swanst. 160, n. *Taylor v. Cook*, 8 Pr. 650. *Jones v. Carrington*, 3 Eas. & Y. 1131. Ans-

Principle on  
which verdicts  
admitted.

In the case of *Reed v. Jackson* before cited, (1) Lawrence, J., says, "reputation would have been evidence of the right of way in question; *a fortiori*, therefore, the finding of twelve men upon their oaths." (2) But it is to be observed, that the statements, upon which the opinion of the former jury was founded, were all made *post litem motam*, and the witnesses, who might be still living, were brought forward by litigating parties, and, further, that their cross-examination by strangers could never be considered as entitling their evidence to any additional weight. In *Neal d. Duke of Athol v. Wilding*, (3) the majority of the Judges would not allow a special verdict to be given in evidence to prove a pedigree, on the ground that it was *res inter alios acta*, and because the same evidence, for any thing they knew to the contrary, might be ready to be laid before the second as before the first jury. In a recent case, upon a question respecting the jurisdiction of the Court of Session of the County of Chester, an order and decree upon the subject, by the Lord High Treasurer and certain other public functionaries of the kingdom (not forming any Court known to the laws), was held to be inadmissible as evidence of reputation, because (as was said by Lord Tenterden) declarations are only evidence of reputation, when made by those who have a personal knowledge of the fact; whereas in the case in question, the persons acting as judges had no knowledge of the fact, except what was derived in the course of the proceeding. (4) Lord Holt, in the case of the *City of London v. Clarke*, (5) which has been before cited, rested the admissibility of the verdicts, which were received in evidence, on the ground, that as payment of

*combe v. Shore*, 1 Taunt. 261. *Fleming v. Simpson*, 2 M. & R. 169. As to the effect of the recent statute in such cases, *vide supra* "Interest of Witnesses."

(1) *Supra*, p. 263.

(2) Lord Kenyon argues for the admissibility of the verdict, on the ground that the defendants both stood in the same relative situation, and compares the case to that of commoners. This notion of verdicts being evidence for or against copyholders by reason of privity, is

adopted by the Court in *Freeman v. Phillips*, 4 Maule & Selw. 491.

(3) 2 Str. 1151, Mr. J. Wright *contra*. It is said in Bull. N. P. 233, that Mr. J. Wright's opinion was generally approved of. And see *ib.* Mr. J. Buller's observations on the case of *Clarges v. Sherwin*, relied on by the Court in the *Duke of Athol's* case.

(4) *Rogers v. Wood*, 2 Barn. & Adol. 245.

(5) Carth. 181. *Supra*, p. 263.

the duties by strangers would have been admissible in evidence, so a recovery against a stranger ought to be received.

With respect to the effect of the evidence supplied by a verdict, Lord Kenyon observed, in *Reed v. Jackson*, (1) that perhaps it was not entitled to much weight, and certainly was not conclusive. It was held, in the same case, that the effect of the verdict, whatever it might be, could not be obviated by any evidence adduced to shew, that the finding of the jury had been indorsed by mistake on the *postea*, and that in fact no evidence had been offered, at the former trial, under the issue, the finding as to which was relied on.

Effect of verdict.

It has been held, that hearsay evidence negating a public right is admissible no less than that which asserts it. Accordingly, upon an issue whether a certain place situate on the bank of a river was a public landing place, evidence was received of reputation, that it was not a public landing place. (2) Mr. Justice Coleridge observed, that there could be no distinction between the evidence of reputation to establish a public right, and such as must be admitted to shew that the public have not that right. A rule for a new trial in this case was afterwards discharged.

Negative.

Reputation.

According to the same course which was followed in treating of pedigree, it is, in the next place, proposed to consider the qualifications, under which evidence of reputation is receivable upon matters of public and general interest.

Qualifications under which hearsay admissible in matters of public or general interest.

Upon this it may be useful to observe, that judges have differed in opinion, concerning the weight to be given to evidence

Caution necessary.

(1) 1 East, 355. Lord Mansfield's observation in the case of the Manchester Mills, 1 Doug. 221, n. that the decree in that case incontrovertibly bound all persons answering the description of inhabitants of Manchester, seems to be untenable. In *Berry v. Banner*, Peake, 157, Lord Kenyon said, that the verdict was very nearly conclusive, if not quite so. As against a parish,

indeed, a record of conviction for not repairing a highway is, it seems, conclusive. *Rex v. St. Pancras*, Peake, 220. It has not been considered an objection to verdicts as evidence of reputation that they were *post litem motam*.

(2) *Drinkwater v. Porter*, 7 C. & P. 181. And see *Reed v. Jackson*, *supra*, p. 263.

of reputation. There are several judicial remarks of a very strong nature to be met with, which shew, at least, that such evidence is open to much observation calculated to weaken its effect. Lord Ellenborough, in *Weeks v. Sparke* (1), observes, "Reputation is, in general, weak evidence; and when it is admitted, it is the duty of the Judge to impress on the minds of the jury how little conclusive it ought to be, lest it should have more weight with them than it ought to have." And Mr. J. Grose observes, that this kind of evidence ought to be very cautiously admitted. (2)

Competent  
knowledge in  
declarant.

The first qualification to be noticed, with respect to receiving evidence of reputation upon matters of public and general interest, is the same, which, as before shewn, applies to the admission of hearsay evidence in matters of pedigree; viz. that the statements should have been made by persons likely to possess a competent knowledge of the facts, to which their statements relate. It has been supposed, that this qualification must necessarily be satisfied, where the matter is of public interest, because, as Lord Kenyon observes, "all mankind being interested therein, it is natural to suppose that they may be conversant with the subject, and that they should discourse together about it, having all the same means of information." (3) And Lord Ellenborough, in *Weeks v. Sparke*, states it as being the general understanding, upon which the decisions of the Courts proceeded; "that upon questions of public right all are interested, and must be presumed conversant with them." (4)

(1) 1 Maule & Selw. 686. Baron Wood, in *Robinson v. Williamson*, 9 Pr. 136, expressly dissents from Lord Ellenborough's opinion; and says that upon questions of moduses reputation was entitled to great weight; and Richards, C. B., in *Moseley v. Davies*, 11 Pr. 162, speaks of reputation as having great weight and effect.

(2) In *Morewood v. Wood*, 14 East, 330. Lord Ellenborough, in *Weeks v. Sparke*, 1 Maule & Selw. 686, professes himself at a loss to understand, why, even in matters

of public right, reputation was ever deemed admissible evidence.

(3) Per Lord Kenyon in *Morewood v. Wood*, 14 East, 329, n. and, in the Berkeley peerage case, 4 Camp. 416, Chief Justice Mansfield, says, "that general rights are naturally talked of in the neighbourhood, and therefore, what is thus dropped in conversation upon such subjects may be presumed to be true."

(4) In *Weeks v. Sparke*, 1 Maule & Selw. 686.



In the case of *Crease v. Barrett* (1) the Court observed, it was clear that hearsay evidence upon some subjects could not be received, unless with a qualification, that it came from persons who had a special interest to inquire; that in cases of pedigree the line was clearly defined; and that in cases of rights or customs, which are not, properly speaking, public, but of a general nature, and concern a multitude of persons, (as questions with respect to boundaries and customs of particular districts,) though the rule is not so clearly laid down, it seems that hearsay evidence is not admissible, unless it is derived from persons conversant with the neighbourhood. The Court further observed, that where the right is really public, (a claim of highway for instance, in which all the king's subjects are interested,) it seems difficult to say, that there ought to be any such limitation, and the Court were not aware, that there was any case in which it had been laid down, that such a limitation existed; that in a matter in which all were concerned, reputation from any one appeared to be receivable; but of course it would be almost worthless, unless it came from persons who were shewn to have some means of knowledge, as by living in the neighbourhood, or frequently using the road in dispute. And in the particular case, which related to a custom in which all the king's subjects had not an interest, but only such as chose to become adventurers in mines within a particular district, it was said that hearsay from persons wholly unconnected with the place in which the mines were found, would not only be of no value, but *probably* be altogether inadmissible. But it was held that the hearsay was admissible of persons under whose estates the minerals lay, with respect to which the custom existed; for that they were sufficiently connected with the subject, though they were not concerned in mining, or receiving the dues of mines.

In *Rogers v. Wood* (2) before cited, we have seen that a document, purporting to be a decree of certain persons, (the Lord High Treasurer, Chancellor of the Exchequer, and Under Treasurer, Chief Baron, and Attorney and Solicitor General, who had no authority as a Court,) was held to be inadmissible,

(1) 1 Cr. M. &amp; R. 927.

(2) 2 Bing. 86. *supra*, p. 264.

as evidence of reputation, on the question whether the city of Chester, before it was made a county of itself, formed a part of the county palatine, because those persons from their situations had no peculiar knowledge of the fact.

In *Weeks v. Sparke*, (1) Mr. J. Le Blanc lays stress upon the circumstance, that the evidence of reputation in that case proceeded from persons who had been conversant with the neighbourhood, where the waste lay to which their statements referred; and that no evidence was received, except from persons connected with the district then in question.

On the other hand, actual inhabitancy in the place, the boundaries of which are in dispute, is unnecessary. In the case of *The Duke of Newcastle v. the Hundred of Broxtowe*, (2) justices of the peace, at the sessions of the county, within which the district was alleged to be, were considered, on account of the character and nature of their office, without proof of their being residents, to have sufficient connection with the subjects in dispute, to render the statements in their orders admissible evidence of reputation.

Declarations in matters of private right.  
Absence of competent knowledge.

The probable want of competent knowledge in the person whose hearsay is admitted, is usually alleged as the ground for rejecting such evidence respecting matters of private interest. "How is it possible for strangers," said Lord Kenyon, "to know any thing of what concerns only private titles?" (3) Even, if the evidence were confined to statements of persons immediately interested in the private rights in question, it is to be observed, that in cases of private right the hearsay would be less likely to be checked and contradicted at the time, if incorrect, than where, as in matters of general interest, it is supposed to be addressed to persons conversant with the subject,

(1) 1 Maule & Selw. 688, 689.

(2) 4 B. & Ad. 273. The orders which contained a statement that Nottingham Castle was within the Hundred, were received as evidence of reputation, not as orders upon matters of which the magistrates had jurisdiction.

(3) Per Lord Kenyon, in *Morewood v. Wood*, 14 East, 329, n.

Lord Kenyon applies this observation also to private customs. Lord Ellenborough, in *Weeks v. Sparke*, 1 Maule & Selw. 686, observes, "It is said, that upon questions of public right all are interested, and must be presumed conversant with them; and that is the distinction taken between public and private rights."

or having an interest to inquire into it, with the means of investigation in their power. (1) In *Talbot v. Lewis*, (2) the answer of tenants of a manor to a commission issued by the lord of the manor, in which it was stated that the lord was entitled to wreck, was rejected, on the ground that the right was a private right, of which the parties making the declarations possessed no peculiar means of knowledge.

It would seem, where proceedings in an ancient suit are produced as evidence of reputation upon matters of public or general interest, it may be presumed that the parties to the suit and the witnesses were actually in the respective capacities which they purport to have been, without proving this by evidence *dehors* the proceedings themselves. (3) Thus, in *Freeman v. Philipps*, (4) an action by a copyholder against the lord of a manor, in which the defendant gave in evidence the proceedings in a suit in Equity in the time of King William III., brought by another copyholder of the same manor against the then lord, it was held that no evidence *aliunde* was requisite to make the proceedings admissible. Mr. J. Bayley says, "We must assume at this time of day that the bill was not a mere fabrication, but was really filed by such a copyholder against the lord, and that the trial was had, and the depositions made between such parties, as were really litigating their rights in the characters claimed and disclosed on the record." And, afterwards, with respect to the depositions, the same Judge observes, "These I do not look upon merely as the declarations of persons unconnected with the subject, but as the depositions of persons, made by them in the character of witnesses brought forward by the copyholder, whose interest it was to put foremost such witnesses as were best able to depose to the matter in dispute. Why am I to assume that

Proof *aliunde*  
of capacity.

(1) It will be seen, afterwards, that no objection arises from the circumstance of the declarant being in *pari jure*, with the person afterwards using the declaration.

(2) 1 Cr. M. & R. 497.

(3) A stricter rule has been laid down in some pedigree cases, *vide supra*, sect. 1. Banbury and Berkeley

peerage cases. The same point occurs in regard to declarations against interest, *infra*. *Davies v. Morgan*, 1 Cr. & I. 591. See *Adamthwaite v. Synge*, 1 St. C. 189. It would seem that a uniform principle ought to prevail in all these cases.

(4) 4 Maule & Selw. 495.

the copyholder brought forward witnesses who were ignorant? I do not agree that it was necessary to prove the witnesses to have been copyholders, in order to let in their testimony. The plaintiff's witnesses in the last trial do not all appear to be copyholders, yet as they were present at the holding of Courts, and, therefore, knew what passed, they were competent to speak to that. So in the former suit, I cannot infer that they were incompetent to have a knowledge of the facts they deposed to: on the contrary, it is to be presumed they had a competent knowledge, being brought forward as witnesses by a copyholder." (1) Lord Ellenborough, in the same case, observes, "Considering the depositions as made in a suit, which may now be said to be lost in remote antiquity, we should give this record but very little effect, if we did not attribute to it verity in many of the particular matters which it contains; such as that the parties litigant were clothed with the rights in which they profess to stand, and were agitating the claim put forward on the record." (2)

Proof of modern enjoyment.

Another qualification, or cautionary rule, in receiving hearsay evidence in matter of public or general interest, has been supposed to be, at least where the nature of the case admits, that a foundation for it should be laid by proving acts of modern enjoyment. Mr. Justice Le Blanc, in speaking of the manner in which matters of this nature are to be proved, says, (3) "First, they are to be proved by acts of enjoyment within the period of living memory; and when that foundation is laid, then inasmuch as there cannot be any witnesses to speak to acts of

(1) The rule is laid down in the judgment cited in the text with great latitude. For, it is presumed, that the declarants were persons whose hearsay was admissible, from the circumstance that they were witnesses, and professed to have knowledge of the facts. Mr. Justice Bayley, in another part of his judgment, appears to have considered the plaintiffs in the two suits as identified in interest, as much as if the plaintiff in the latter suit had derived title from the plaintiff in the former. And he speaks of the proceedings being

*inter eosdem acta*. But it would seem that the proceedings were admitted on the footing of reputation, and not of a *res judicata*.

(2) That little effect would be given to the record without giving credit to the character of the parties does not appear to be a good reason for giving such credit. In *Dean v. Spray*, 1 T. R. 473, a case relating to a copyhold custom, credit was given to the purport of a document, professing to be *ex assensu omnium tenentium*.

(3) In *Weeks v. Sparke*, 1 Maule & Selw. 688.

enjoyment beyond the time of living memory, evidence is to be admitted from old persons of what they have heard other persons of the same neighbourhood, since deceased, say respecting the right." Again, "after a foundation is once laid for the right by proving acts of ownership the evidence of reputation becomes admissible." And Mr. Justice Buller observes, in *Morewood v. Wood*, (1) "Thus far I agree with Lord Kenyon and Mr. Justice Ashurst, that in no case ought evidence of reputation to be received, except a foundation be laid, by other evidence, of the right."

But in the late case of *Crease v. Barrett* (2) in answer to an observation, that all evidence of reputation was inadmissible, unless confirmed by proof of facts, it was said that such proof was not an essential condition of it's reception; but that it was only material as affected it's value when received.

Where the subject matter of the question does not, from its nature, admit of acts of enjoyment, as in a question of parochiality, proof of reputation, unaccompanied by evidence of acts done, is, admissible. On a question respecting the custom of descent within a manor, it has been held, that reputation is admissible, without shewing any instances of it's having been put in use. (3) For were it otherwise, if no instances were to happen within the memory of man, and the old Court Rolls were to be lost, the custom itself would be entirely destroyed; (4) and in *Steele v. Prickett*, Lord Ten-terden intimated an opinion, that the existence of a manor

(1) 14 East, 330, n., and see *Ratcliff v. Chapman*, 4 Leon. 242, commented on in 5 T. R. 32. In *White v. Lisle*, 4 Madd. 214, the Vice Chancellor says, that evidence of reputation was only admitted in confirmation of actual enjoyment, and not against it.

(2) 1 Cr. M. & R. There was however sufficient proof of enjoyment given in the case.

(3) *Beebee v. Parker*, 5 T. R. 26, 31. *Doe d. Foster v. Sisson*, 12 East, 62. In this case, however,

some particular instances of a more confined custom were proved: which Lord Ellenborough described as branching out of the same root.

(4) Per Grose, J., 5 T. R. 32. For this reason a single instance is allowed to be evidence of a custom, *Roe v. Jeffery*, 2 Maule & Selw. 92. *Doe v. Mason*, 3 Wils. 63. In *Godb. 55*, it is said, that in the prescription of Gavelkind, it must be shewn that the land is partible and has been parted, but this is denied to be law, unless it be confined to

might be proved by reputation alone, without evidence of the exercise of any manorial rights. (1)

Declarations  
*ante litem*  
*motam.*

The next qualification, in receiving hearsay evidence of matters of public or general interest, is one which equally applies to hearsay evidence in matters of pedigree: the consideration of it has consequently been postponed, until it could be illustrated by examples drawn from both subjects. (2) This qualification is commonly expressed by saying that declarations, to be receivable, must have been made *ante litem motam*. The phrase is borrowed from the civil law, the commentators upon which had made the declarations in question the subject of learned remarks, long before they became a matter of attention to English lawyers.

Berkeley  
peerage case.

The first case, in which the precise time of making the declarations became the subject of particular inquiry and consideration, was the Berkeley peerage case. (3) This case came before the House of Lords A.D. 1811; the only matter of controversy depended on the reality of the first marriage alleged to have taken place between the parents of the claimant. A question was, on that occasion, proposed to the Judges, in the following terms: (4) "Upon the trial of an ejectment respecting Black Acre between A., and B. (in which it was necessary for A. to prove that he was the legitimate son of J. S.) A., after proving by other evidence that J. S. was his reputed father, offered to give in evidence a deposition made by J. S. in a cause in Chancery, instituted by A. against C. D., in order to perpetuate testimony to the alleged fact (disputed by C. D.),

such lands of this nature as lie out of the county of Kent, Robins. on Gravelkind, 49.

(1) 2 Stark. C. 466. This was ruled by Lord Kenyon in *Curzon v. Lemon*, 5 Esp. 60.

(2) *Vide supra*, sect. 1.

(3) 4 Camp. 491. The earlier cases on the subject were contradictory. But the question cannot be considered as having been maturely discussed before the Berkeley peerage case. The authorities prior to that

case were *Vin. Abr. T. b. 91. Haywood v. Firmin*, Sitt. after Trin. Term, 1766, cited by Lawrence, J., in the Berkeley peerage case. *Goodright v. Moss*, Cowp. 594, Lord Camden had ruled for receiving the evidence. Chief Baron Reynolds and Mr. Justice Eyre for rejecting it. See *Slaney v. Wade*, 1 Myl. & Cr. 338, *supra*, as to copies *post litem motam* of an ancient monumental inscription.

(4) May 2, 1811, MS.

that he was the legitimate son of J. S., in which character he claimed an estate in remainder in White Acre, which was also claimed in remainder by C. D., B., the defendant, in the ejectment did not claim Black Acre under either A. or C. D., the plaintiff and defendant in the Chancery suit. According to law, could the deposition of J. S. be received in evidence upon the trial of such ejectment against B., as evidence of declarations of J. S. the alleged father, in matters of pedigree?" The Judges who were present afterwards stated their opinions at length, and with only one dissentient voice, agreed in considering the deposition of J. S. to be inadmissible. Mr. Justice Lawrence delivered his opinion in the following terms: (1) "The declarations of members of the family, in matters of pedigree, are generally admitted, from the necessity of the case; but the administration of justice would be perverted, if such declarations could be admitted, which have not a presumption in their favour, that they are consistent with truth. Where the relater had no interest to serve, and there is no ground for supposing that his mind stood otherwise than even upon the subject (which may be fairly inferred before any dispute upon it has arisen), we may reasonably suppose, that he neither stops short, nor goes beyond the limits of truth, in his spontaneous declarations respecting his relations and the state of his family. The receiving of these declarations, therefore, though made without the sanction of an oath, and without any opportunity of cross-examination, may not be attended with such mischief as the rejection of such evidence, which in matters of pedigree would often be the rejection of all the evidence that could be offered. But mischievous indeed would be the consequence of receiving an *ex parte* statement of a deceased witness, although upon oath, procured by the party who would take advantage of it, and delivered under that bias which may naturally operate on the mind in the course of a controversy upon the subject. Notwithstanding what is said in the case of *Stevens v. Moss*, I cannot think that Lord Mansfield would have held, that declarations in matters of pedigree, made after the controversy

(1) 4 Campb. 409.

had arisen, ought to be submitted to the jury. They stand precisely on the same footing as declarations on questions of rights of way, rights of common, and other matters depending upon usage; and although I cannot call to mind the ruling of any particular Judge upon the subject, yet I know that according to my experience of the practice (an experience of nearly forty years), whenever a witness has admitted, that what he was going to state he had heard after the beginning of a controversy, his testimony has been uniformly rejected. If the danger of fabrication and falsehood be a reason for rejecting such evidence in the cases of prescription, that will equally apply in cases of pedigree, where the stake is generally of much greater value." Then, after referring to the decided cases, the learned Judge added,—“The authorities being thus balanced, I think the point must be considered as without any decision, and we must resort to principle and the uniform practice, which has obtained in questions of prescription. Hardships may arise in rejecting declarations made between the commencement of the suit and the time of the trial; but such hardships are not confined to the case of pedigree. In other cases, if witnesses die before the trial of the cause, the party, who relied upon their testimony, must sustain the loss. For avoiding uncertainty in judicial proceedings, general rules must be laid down and adhered to, without regard to our feelings or our wishes on particular occasions. Besides, the hardship may generally be avoided by a bill to perpetuate testimony. Although the exclusion of declarations made in the course of the controversy may prejudice some individuals, it is better to submit to this inconvenience than expose courts of justice to the frauds which would be practised upon them if a contrary rule were to prevail. That this is not an imaginary apprehension, will appear from what happened in the *Douglas* and *Anglesea* causes: in the first of which, fabricated letters were given in evidence; and in the second, false declarations. Notwithstanding the danger of incurring the penalties of the crime of perjury, there is scarce an assize or sittings in which witnesses are not produced, who swear in direct contradiction, the one to the other: and it may be feared, that persons, who have as little



regard to truth, may be induced to make false declarations, when they run no risk of punishment in this world, as no use can be made of their evidence till after their death. We know that passion, prejudice, party, and even good-will, tempt many who preserve a fair character with the world, to deviate from the truth, in the laxity of conversation. Can it be presumed that a man stands perfectly indifferent, upon an existing dispute respecting his kindred? His declarations *post litem motam*, not merely after the commencement of the lawsuit, but *after the dispute has arisen* (that is the primary meaning of the word *lis*.) are evidently more likely to mislead the jury, than to direct them to a right conclusion, and, therefore, ought not to be received in evidence. I am likewise of opinion, that no deposition can be received in evidence as a declaration, to prove a fact which it was the object of that deposition to establish. A deposition is the answer of the witness to such interrogatories as it is thought expedient to put to him to establish certain facts which the plaintiff alleges, and on which the case depends. Consequently, a deposition is considered a partial representation of facts, as to all persons who have no opportunity of bringing out the whole truth by cross-examination; and on that account all admit, that, against a stranger, it cannot be received in evidence as a deposition. How then shall it be received as a declaration? In that case, the circumstances of it's being upon oath cannot be regarded. To consider it a declaration on oath would be to receive it as deposition. As a declaration, it is still subject to the same vice and infirmity, of being an answer to particular questions artfully put, with an interested view, by one party behind the back of another. All the objections by which it is allowed that this document cannot be received as a declaration, apply, with at least equal strength to receiving it as a deposition.

The summary of the doctrine is given by Lord Eldon, in a pedigree case, where he says, that "the admissibility of traditional evidence is founded upon the presumption, that the words given in evidence are the natural effusion of the party,

upon an occasion when his mind stands even, without bias, to exceed the truth or to fall short of it." (1)

*Lis mota* defined.

With respect to the particular meaning of the term *lis mota*, it has been seen that Mr. Justice Lawrence says, that "declarations *post litem motam*, not merely after the commencement of the lawsuit, but *after the dispute has arisen*, (that is the primary meaning of the word *lis*) ought not to be received in evidence." And in the case of *Monckton v. The Attorney General*, (2) also a case of pedigree, the Lord Chancellor says, "shew me that the pedigree in question was prepared with a view of profiting the maker of it, or those in whom he is interested; bring it within the rule either of *Whitelocke v. Baker* or the Berkeley peerage case; prove that it was made *post litem motam*—not meaning thereby a suit actually pending, but a controversy existing—and that the person making or concocting the declaration took part in the controversy; shew me even that there was a contemplation of legal proceedings, with a view to which the pedigree was manufactured, and I shall then hold, that it comes within the rule which rejects evidence fabricated for a purpose, by a man who has an interest of his own to serve. The question, then, always will be, was the evidence in the particular circumstances manufactured, or was it spontaneous and natural?"

Where a person died possessed of property, which many years afterwards another person commenced a suit to recover, and, in the year after the first person's death, a relation of the second person made a declaration, the effect of which was to

(1) *Whitelock v. Baker*, 13 Ves. 511. In *Freeman v. Phillips*, Mr. Justice Bayley says, "where there is a *lis mota*, you cannot be sure, that in admitting the depositions of witnesses selected and brought forward on a particular side of the question, who embark to a certain degree with the feelings and prejudices belonging to that particular

side, you are drawing evidence from perfectly unpolluted sources. The Lord Chancellor, in *Monckton v. Atty. Gen.*, 2 Russ. & Myl. 161, says, that in the Berkeley peerage case, Mr. Justice Lawrence adopts almost the very language of Lord Eldon in *Whitelocke v. Baker*.

(2) 2 Russ. & Myl. 161.

prove that he was the heir and next of kin of the first person, it was held that the second person could not avail himself of such a declaration in evidence. It was argued, that if the existence of a controversy were essential to the exclusion of the evidence, a party might lie by and make no controversy, till he had got a sufficient body of such evidence. The evidence was rejected by Alderson, B., on the principle that the commencement of the controversy must be taken to be the arising of that state of facts on which the claim is founded without any thing more. (1)

Chief Justice Mansfield, in his judgment in the Berkeley peerage case, after giving the same definition of *lis mota*, saying, that the line of distinction was the *origin of the controversy* and not the *commencement* of the *suit*, expressed his opinion that all declarations are to be excluded after the controversy has originated, whether it was or was not *known to the witness*; he said, if an inquiry were to be instituted in each instance, whether the existence of the controversy was known at the time of the declaration, much time would be wasted and great confusion produced. (2)

Knowledge of  
*lis mota* by de-  
clarant.

In one case, (3) upon a question of *boundary* between two

*Lis mota*. Ge-  
neral rights.

(1) *Walker v. Beauchamp*, 6 C. & P. 552.

(2) 4 Campb. 417. Per Alderson, B., in *Walker v. Beauchamp*, 6 C. & P. 560. Among the civilians the following distinction prevailed upon this subject. The general rule was, as with us, that hearsay *post litem motam*, was inadmissible in questions of consanguinity, as well as of boundary; but if the witness proved that he heard the fact in a place very far distant from that *ubi res agitur* even though *post litem motam*, his evidence was to be admitted. In *Mascardus de Probationibus* (which is in all likelihood the same book as that to which Chief Justice Mansfield refers, (4 Campb. 417.), as being a treatise of great learning, entitled *De Proba-*

*tionibus*), in which the distinction between *ante litem motam* and *post litem motam* is taken, after a statement of the general rule, this exception and the reason for it are thus mentioned: "Istud autem quod diximus, debere testes deponere ante litem motam, sic est accipiendum ut verum sit, si ibidem, ubi res agitur, audierit: at si alibi in loco qui longissime distaret sic intellexerit, etiam post litem motam, testes de auditu admittuntur. Longinquitas enim loci in causâ est ut omnis suspicio abesse videatur, quæ quidem suspicio adesse potest, quando testis de auditu post litem motam, ibidem, ubi res agitur, deponit. *Mascardus Conclus.* 410, n. 5."

(3) *Nicholls v. Parker*, Exeter Summer Assizes, 1805, 14 East,

parishes and manors, declarations were admitted, although the boundary had been long in dispute between the respective parishes and manors, and intersecting perambulations had been made both before and after the declarations, there being no litigation actually pending at the time. The rule respecting *lis mota* does not, however, appear to have been then settled, and it may be doubted whether such evidence would now be admitted.

In a case at *nisi prius*, where the question was, whether the occupier of a particular farm was liable to the repair of a public road, and to prove the affirmative an award was produced, which had been made some years before, when the same question was the subject of dispute between a former occupier and the township where the lands were situated, the evidence was rejected as inadmissible. "The very submission," Mr. Justice Dampier observed, "shews, that the question was then agitated between the township and the occupier;" and as the account, which deceased witnesses might have given to the arbitrator on that occasion, could not have been received, because the declarations were made *post litem motam*, so the opinion of the arbitrator formed upon such testimony could be entitled to no more credit. (1)

In a case, where an ancient presentment of a homage was produced, according to which the jurors purported on their oaths to have considered and negatived the claim of a freeholder of the manor, after hearing the evidence produced by him, the presentment was held to be inadmissible, on the

331, n. Le Blanc, J., in this case says, "that there was no dispute at the time respecting the right of the old persons making the declarations, at least no litigation pending; so that these persons could not be considered as having it in view to make evidence for themselves at the time." So that the principle was admitted; though doubts may be entertained as to it's having been properly applied.

(1) *Rex v. Cotton*, 3 Campb. 444. In the first trial of the Cambridge toll case, an award was rejected as evidence of the reputation of tolls; and also another award was rejected on the second trial. But a composition deed, reciting the award, was received: *Brett v. Beales*, 1 Mo. & M. 418. It has been seen, that verdicts are evidence in matters of reputation, notwithstanding they necessarily occur *post litem motam*.

ground, that it appeared upon it's face to have been made *post litem motam*. (1)

It would seem that the admissibility of hearsay evidence upon a different controversy, will depend on the circumstance, whether the point as to which the evidence is material was in litigation, or whether the truth of it was assented to or assumed by both the contending parties.

*Lis mota* upon another point of controversy.

In the case of *Freeman v. Phillipps*, (2) an action was brought by a copyholder against the lord of a manor, in which the copyholder relied upon a custom, that the lord could not assess a fine upon filling up lives, upon copyholds held for life, without the intervention of the homage. The lord gave in evidence the proceedings in an ancient suit brought by a copyholder against the then lord, in which the copyholder insisted on a particular custom relative to the filling up of lives, not being that which was in dispute in the latter suit, and throughout the former suit no mention was made of the approbation of the homage being necessary. The Court held, that there was no valid objection to the proceedings being given in evidence, because the *lis mota* was not on the very same point, and that the proceedings were not evidence of any thing affirmed by the witnesses, but were material on account of what the witnesses omitted to declare, that is to say, that where a dispute existed concerning the copyholder's right to renew, on some terms, it was never made a term that the fine should be assessed by the homage. In the case of the *Duke of Newcastle v. The Hundred of Broxlowe*, (3) orders of magistrates at sessions were received as evidence, of reputation concerning the point whether Nottingham Castle was situated within the hundred; for although they were made upon controverted matters, there was no controversy upon that particular question.

Subject of declaration not litigated.

(1) *Richards v. Bassett*, 10 Barn. & Cress. 657.

(2) 4 Maule & Selw. 493. It would seem to have been assumed in this case, that where there is a *lis mota*, declarations will be inad-

missible, though adduced *against* a person standing in *pari jure* with the declarant, (there being no privity between them.)

(3) 4 B. & Ad. 279.

Subject of declaration  
litigated.

In a late claim of peerage, a private pedigree, which had been compiled by the father of the claimant with a view to support a claim to certain estates, and laid before counsel for that purpose, was held inadmissible by the House of Lords, as not being a spontaneous effusion, but made for a particular object, and in contemplation of litigation. (1) The peerage in this case was claimed through the mother of the claimant, and not only were the controversies therefore different, but the father, who compiled the pedigree, never could have had an interest in the present claim. It also appeared, that when the claim was made to the estates, the descent was taken for granted on both sides; but their Lordships held, that the parties agreeing in the statement made no difference, as it might be equally for the interest of each to admit a particular statement though contrary to truth.

The distinction between this case and that of *Freeman v. Phillips*, seems to be that in this case, though the two claims were essentially different, yet the pedigree or subject-matter of the declaration was a matter litigated in both; whereas in the other case

(1) *Slane peerage*, printed minutes, 1830, part 2, p. 35, and part 3, p. 6. A private pedigree found among the papers of the claimant's family, was offered in evidence, but it appeared that it had been compiled by the father of the claimant, with a view to support a claim to certain estates. The counsel were informed that a pedigree, to be receivable, must be a spontaneous effusion; that if made for a particular object in contemplation of litigation, it was not receivable in evidence. It was stated, that the father of the claimant who made out the pedigree, could have had no interest in this question, as he never could have made this claim, because the claimant claimed through his mother, and that there had not then been any proceedings instituted of which they had any knowledge. The counsel were informed, that it appeared to their lordships that this could be re-

ceived only *de bene esse*, the matter requiring further consideration; that it must be made clear that the party was at the time perfectly independent as to any matter which might be decided by it. It afterwards, however, was proved that this pedigree was drawn up in order to lay claim to property, and had been laid before counsel; and although it was stated that the descent was taken for granted on both sides, counsel were informed by their Lordships, that, if a person sat down, when in the prospect of a contest for property, to propose such a paper, it had never been received; that the parties agreeing in the statement did not make any difference as it might be equally for the interest of each party to admit a particular fact, though contrary to truth. That it appeared to their Lordships this paper could not be received on the present evidence.

the customs, respecting which the declarations were, made were not only different in the different suits, but in the ancient suit the qualifications of the lord's right by the intervention of the homage appeared not to have been in dispute, but to have been tacitly negated in the understanding of both plaintiff and defendant.

The rule before mentioned, that "the words given in evidence are to be the natural effusion of the party, upon an occasion where his mind stands even, without bias, to exceed the truth or to fall short of it" must be received with certain limitations. (1) For, in the first place, declarations will not be invalidated, though made for the express purpose of preventing disputes in a family. Thus, Lord Mansfield observes, "I have known advice given to a father and mother to make attested declarations in writing under their hand, of the precise time of the birth of the bastard *eigne* and the subsequent marriage, to prevent controversy in the family touching the inheritance." (2) And the Judges, in their answer to the third query in the Berkeley peerage case, say that "an entry in a Bible or any other book, or any other piece of paper would be admissible, notwithstanding it was proved that such entry was made by a parent for the express purpose of establishing the legitimacy of his son, and the time of birth, in case the same should be called in question after his father's death." They add, that the particularity of the entry would be a strong circumstance of suspicion; but still it would be receivable, whatever the credit might be to which it was entitled. (3)

Declarations with a view to future controversy.

Upon this subject, Brougham, Lord Ch., observes in *Monkton v. Attorney General*, (4) that Lord Mansfield's remarks in *Goodright v. Moss*, sanction the doctrine, that the having a distinct object in view in making a declaration, by parol or in

(1) 2 Russ. & Myl. 159.

(2) In *Goodright v. Moss*, 591. And see *Monkton v. Att. Gen.* 2 Russ. & Myl. 164.

(3) 4 Camp. 418.

(4) 2 Russ. & Myl. 164. In *Slaney*

*v. Wade*, 1 Myl. & Cr., *supra*, copies of a mural inscription were held not liable to objection, because at the time they were made there was a possibility of a controversy at some future period contemplated.

writing, even though the object can only be gained by afterwards using the declaration in evidence, is not sufficient to exclude the declaration. If the father or mother make a pedigree for the purpose of preventing disputes in the family, Lord Mansfield said, in effect, that he would admit that pedigree in evidence, even when those very disputes arise; because it was not made with a view to their own interest, but to preserve a *constat*, as it were, on record, of facts peculiarly within their knowledge, (which is one of the main grounds of admitting such hearsay evidence) and that the observation that it was made for the purpose of settling family disputes, and may not have been so spontaneous and natural as some of the *dicta* of the Judges would seem to require, shall only go to its weight and credit with the jury, and shall not preclude its admission by the Court.

Declarations  
of persons in  
*pari jure*.

It will be no valid objection to the evidence, on the ground of bias, that the party making the declaration may have stood, or thought he stood, *in pari casu* with the party tendering the declaration. And although the party, if he had been living, might have stood in the very situation of the person who tenders his declaration in evidence, that circumstance is not sufficient to exclude it. (1) The reason of admitting the evidence in these cases appears to be, that since competent knowledge is required to make hearsay receivable in matters of tradition, and a probability also of the declarations having occurred naturally in the course of familiar intercourse, it would almost dry up such sources of information, to require further an absence of all bias on the subject of the declarations. It has been thought to be some safeguard, sufficient at least to warrant the admissibility of the evidence upon points where no better evidence can commonly be expected, that the declarant could derive no advantage from

(1) Per the Lord Chancellor, in *Monkton v. Att. Gen.*, 2 Russ. & Myl. 159, 160. The Lord Chancellor said, "that with the exception of Drummond's case, 1 Leach, Cr. C. 578, where the evidence was

clearly inadmissible upon other grounds there was no warrant for saying that the declarations of a person in *pari casu*, were inadmissible in cases of pedigree."



his own statements, and that there was at the time no exciting cause to induce him to depart from the truth. (1)

Thus the declarations of a person entitled in remainder, In pedigree. stating the extinction of the issue of persons standing in the line of entail between her and the then possessor of the estate, were held admissible for the plaintiff claiming through her. (2) And in a peerage case before the House of Lords, a widow was allowed to prove the declarations of her deceased husband, in support of her son's title; though the husband, if living, would have had the right which the declarations tended to establish. (3) But in the claim of Sir Cecil Bishopp to the barony of Zouch, some private papers, purporting to be the pedigree of Lord Zouch, which had been in the possession of a deceased lady, who was a branch of the family, were held inadmissible by the House of Lords, it appearing that this lady had conceived herself entitled to the peerage which the petitioner claimed. (4) It is probable, however, that the true ground of rejection was, that the pedigree was compiled in contemplation of a claim.

On a question of parochial or manorial boundary, the declarations of old persons, deceased, are admissible, though they were parishioners, and claimed rights of common on the wastes which their declarations had a tendency to enlarge. (5) And in like manner, on a question of a parochial *modus*, it is allowable to give in evidence the declarations of deceased parishioners and occupiers of lands in the parish, who were In matters of public or general interest.

(1) It is said by the Court, in *Harwood v. Sims*, Wightw. 112, that the rejecting of evidence of persons in *pari jure*, would cut up entirely all evidence of reputation. And see the reasons of the Barons in *Moseley v. Davies*, 11 Pr. 162, and of *Graham, B.*, 13 Pr. 236. In the circumstances of absence of interest and excitement of litigation, the testimony is less suspicious than that which is generally given on a trial. And where there is not an open examination, as in the proceedings of Courts of Equity, it seems

entitled to nearly equal weight

(2) *Doe d. Tilman v. Tarver*, Ry. & Moo. 141.

(3) By Lord Tenterden, C. J., Ry. & Moo. 142. Of this case the Lord Chancellor observes, in *Monkton v. Att. Gen.*, 2 Russ. & Myl. 160, "A stronger instance of similarity of situation can hardly be conceived, and this case certainly seems to go a great way."

(4) *Zouch of Haryngworth peerage* printed minutes, 1804, p. 207.

(5) *Nicholls v. Parker*, 14 East, 331, n.

liable to pay tithe. (1) For although the testimony of these persons, when alive, would have been inadmissible, on the ground of interest, this objection does not apply to their declarations, since they are not evidence, till a period when they are no longer available for the authors. (2) In *Crease v. Barrett*, (3) certain answers of *conventional* tenants were objected to, as not being admissible against the freeholders of a manor, to whom it was said they had an adverse interest, and it was contended, that all the cases in which the hearsay of copyholders had been received, related to questions between lord and copyholder, and copyholder and copyholder. (4) The answers, however, were held to be admissible evidence.

Declarations  
of deceased  
persons.

Lastly, it is a qualification to which evidence of reputation is subject, that it cannot be received so long as the declarant is alive. This is in conformity with the rule which requires the

(1) *Harwood v. Sims*, 1 Wightw. 112. *Moseley v. Davies*, 11 Pr. 162, 180. *Deade v. Hancock*, 13 Pr. 226. In *Moseley v. Davies*, 11 Pr. 162, it was said by Chief Baron Richards, that the witness need not specify from whom he heard the declarations, for they might be strangers, or their names might be forgotten. In this case the principle upon which declarations of persons in *pari jure* are admissible, was much considered.

(2) Per Graham, B., 13 Pr. 236, on this ground, it would seem, that the declarations of deceased corporators, would, before the change of the law, have been evidence in support of a custom to exclude foreigners, although the corporators could not have been examined, if living. Per Lord Lyndhurst, in *Dacres v. Morgan*, 1 Cr. & J. 593. In *Freeman v. Phillipps*, 4 Maule & Selw. 491, respecting a copyhold custom, the Court take pains to shew that the ancient depositions which were admitted, were of persons standing in *pari jure* or *eodem jure*, and Lord Ellenborough appears to have considered that as the ground of their admissibility, and he says, that in

the case of *Leeds Mills*, similar depositions were received as the depositions of persons standing in *pari jure*; and a similar doctrine as to the privity of copyholders, is adopted by Lord Kenyon, in *Reed v. Jackson*, 1 East, 355. It would seem, however, that a copyholder was not bound by the declaration of a copyholder in an ancient suit, still less by that of a witness, produced by such copyholder, on account of his standing in *pari jure* with himself, (there being no privity of blood or estate proved); but on account of his being conversant with the facts of which he was speaking. Neither does there appear to be a very valid distinction as to the principle of the admissibility of the evidence, between the case where the ancient declaration of a copyholder is used against a modern copyholder, and when it is used for him. See *Chapman v. Cowlan*, 13 East, 10.

(3) 1 Cr. M. & R. 927, the point was not particularly adverted to in the judgment of the Court.

(4) *Roe v. Parker*, 5 T. R. 26. *Chapman v. Cowlan*, 13 East, 10.

best evidence to be produced. The examination of this rule, in a subsequent chapter, will afford further illustrations of the present subject. (1)

## CHAPTER XIV.

### HEARSAY EVIDENCE OF ANCIENT POSSESSION.

IT has been seen, that hearsay evidence, in matters of private interest, not affecting any public or general interest, is, in general, inadmissible, especially where the matters do not involve any prescriptive right. But the admissibility of ancient documents, purporting to constitute a part of transactions themselves, to which the party against whom the evidence is produced is not privy, as acts of ownership, or of the exercise of right, stands upon a different principle. On the one hand, the documents in question consist of evidence which is not *proved* to be part of any *res gestæ*, because the only proof of the transaction is the documents themselves; and they do not amount to complete acts in themselves, because they might have been fabricated, or might never have been acted upon. Further, the effect of the evidence is to benefit persons connected in interest with those with whom it originates, and from whose custody it is produced. On the other hand, such is often the only attainable evidence of those ancient acts of possession which are of great weight in the investigation of titles; and they naturally accompany, and, indeed, constitute, a part of such acts. There is some presumption also against the fabrication of instruments, where they refer to co-existing subjects, by which their truth might be examined. (2)

Ancient documents evidence of possession.

(1) The doctrine of C. B. Richards in *Moseley v. Davies*, 11 Fr. 162, *supra*, 284, n. seems to require some limitation in this respect. The Chief Baron there says, that it is not necessary that the witness

should be able to state from whom he heard the declarations.

(2) See per Lord Kenyon, in *Clarkson v. Woodhouse*, 5 T. R. 413, n.

Hence ancient documents, purporting to be a part of transactions, and not a mere narrative of them, are, under certain qualifications, which will be noticed, receivable as evidence that those transactions really occurred. And, in this sense, the documents may be called hearsay evidence of ancient possession. Such evidence is very commonly adduced in practice to corroborate modern use or possession. (1)

Thus, upon a question as to the right of a lord of a manor to hold certain land within the manor free from common, several counterparts of leases found among the muniments of the lord of the manor, and from which it appeared that the land had been demised by the lord free from common, were held to be receivable in evidence. (2) In an action of trespass, upon issue joined on a plea of justification by virtue of a prescriptive right of fishery appurtenant to a manor, old licences on the court rolls, and leases granted by the lords of the manor, in consideration of certain rents, to fish in the *locus in quo*, were held to be receivable evidence. Mr. J. Heath, in this case, observed, that he could not distinguish the licences from old leases, which were always received in evidence, in favour of those claiming under the lessors. (3) And rent rolls, where payments have been made, are good evidence. (4)

(1) In *White v. Lisle*, 4 Madd. 214, the Vice Chancellor appears to have considered the admissibility of leases as purely a question of the admissibility of evidence of reputation, depending on the point whether the right in dispute was a public or private right. But this view does not appear consistent with the effect of the authorities.

(2) *Clarkson v. Woodhouse*, 5 T. R. 412, n. 3 Dougl. 189. The Lord's right as affecting the copyholders, would, it is conceived, have been proveable by reputation. Similar leases were treated as evidence of reputation in *Barnes v. Mawson*, 1 Maule & Selw. 78, *supra*. In *Leathes v. Newit*, 4 Pr. 355. 8 Pr. 562, numerous leases were read, in order to shew what tithes had been

demised as belonging to the rector; and see as to the recitals in leases *Fisher v. Graves*, 3 Eag. & Y. tithe cases 1180.

(3) *Rogers v. Allen*, 1 Camph. 309. In this case, though the claim was instituted by a lord of the manor, and the licences were found on the court rolls, it does not appear that the right claimed affected any matter of general interest, or that the evidence derived any weight from being used against copyholders who might be bound by the contents of the rolls. In *Biddulph v. Ather*, 2 Wils. 23, the Lord proved his prescriptive right to wreck partly by evidence of old court rolls.

(4) *Woodnorth v. Lord Cobham*, Bunb. 180. 1 Eag. & Y. tithe cases,

It has been questioned, however, whether ancient leases are proper evidence against strangers, of the boundary of the property conveyed. In *Clarkson v. Woodhouse*, (1) Lord Kenyon said, that the case before him, in which it was determined that old leases were receivable to prove the fact of the lord of a manor granting certain land free from common, differed from the case of *Lord Pomfret v. Smith*, where Lord Pomfret offered a lease by himself or his predecessor, describing the premises in dispute as lying within the limits of Lord Pomfret's estate, the question being on the boundaries. (2) But on reference to the report of that case, it would seem that no part of the lease, upon the admissibility of which the principal question arose, applied to the place in dispute, but only the words of an exception contained in it; and, therefore, it was contended that the lease, not containing a demise of the lands in question, was not evidence of an act of ownership, but only shewed that the lands were excepted by a description injurious to the right of a stranger, against whom that description was attempted to be used. It would seem that an ancient lease was, under the qualifications to be mentioned, evidence of an act of ownership

Ancient documents evidence of boundary.

802. In *Newburgh v. Newburgh*, 12 Vin. Abr. T. b. 43, it was held, that old rent rolls were admissible evidence to prove fee farm rents, for being very ancient, it would not be supposed they were made with a view to serve the present purpose. In 12 Vin. Abr. A. b. 66, it is said a rental is but weak evidence, unless payment is also proved, and not sufficient *per se*, by Comyns, B., 12 Vin. Abr. 90, pl. 14, rentals without money received and paid upon them are nothing. By Tindal, C. J., in *Lancum v. Lovell*, 6 C. & P. 441, an ancient counterpart of feoffment produced from corporation muniments was rejected, because, no rent had been received in respect of the property.

(1) 5 T. R. 413, n. It has been seen, however that parochial descriptions in leases are evidence upon questions of public right, where reputation is admissible, *Flaxton v. Dare*, 10 Barn. & Cress. 17.

(2) The case of *Lord Pomfret v. Smith*, is reported in 6 Bro. P. C. 440. But the only judgment there reported is an award of a trial at bar; the order, however, perhaps implied that their Lordships were dissatisfied with the leases having been received upon a former trial. The lease adverted to in the text, was dated, A. D. 1742. And the trial took place in 1770, the description being contained in an exception only, proof of possession was out of the question. In *Prescot v. Philips*, briefly noticed in 2 Evans's Pothier, 292, the Court of King's Bench appear to have rejected evidence of the description of lands contained in an old deed. Sir D. Evans argued, apparently with reason, that the presumption ought to have been against the supposition of a fictitious description being inserted of a co-existing subject, which, at the time, would speak for itself.

over every parcel of property contained within the description of the lease; though, from the nature of documents of this description, the evidence which such a lease afforded as to boundary might be entitled to less weight than the evidence to be derived from it upon other points; as, for example, that the land was not subject to a right of common.

Maps.

A map annexed to a deed, seems to stand on the same footing as a description contained in the deed itself, and to be admissible in evidence, where it is part of the act by which property is to be conveyed. (1)

But where a map or survey is not connected with any act of ownership, it would appear to be inadmissible evidence to prove the parcels of an estate; at least so far as respects the principle of evidence under consideration. (2)

Proof of acting  
with respect to  
the documents.

Evidence of the nature under consideration, can only be received subject to several qualifications. In the first place, some acting with reference to the documents, is required to be shewn, if the nature of the case admits of it. In the case of *Clarkson v. Woodhouse*, (3) the trial took place A. D. 1793, and the three leases, which were produced, were respectively of the dates A. D. 1670, 1702, 1730. As to the two oldest of them, the Court ruled that their antiquity rendered it unnecessary

(1) *Gilb. Ev.* 3d edit. 78, cites *Yates v. Harris*, Hil. Ass. 1702, where an old map of lands was allowed in evidence, which came along with the writings, and agreed with the boundaries in an ancient purchase. See also 1 Str. 95, n., last ed. 4 Nev. & M. 81. 1 Lord Raym. 734. The case as stated in *Gilbert* is involved in considerable obscurity. See *Doe v. Laken*, 7 C. & P. 481. *Wakeman v. West*, 7 C. & P. 479.

(2) *Anon.* 1 Str. 95. *Bridgman v. Jennings*, 1 Lord Raym. 734. B. N. P. 283. *Pollard v. Scott*, Peake, 18, by Lord Kenyon. See *Wakeman v. West*, 7 C. & P. 479.

*Doe v. Laken*, 7 C. & P. 481. *Doe v. Seaton*, 1 N. & M. 81. *Dennison v. Elsley*, 2 Eag. & Y., tithe cases, 1396, n., evidence derived from a map rejected, 12 Vin. Abr. 90, pl. 12. Survey books of a manor, which are ancient, unless signed by the tenants, or unless they appear to be made at a Court of Survey, are only private memorials. Maps are sometimes admissible as public documentary evidence, or in the nature of admissions by parties, who are privies to the makers, or upon the ground of their relating to matters of public interest.

(3) 3 Doug. 5 T. R. 413, n. *supra*, p. 287.

because it was not likely to be practicable to prove possession under them. The most recent lease was rejected at the trial. In *Rogers v. Allen*, (1) leases were produced, which bore date from the year 1661, downwards to the end of the seventeenth century, and the cause was tried A. D. 1808. Heath, J., ruled that it was not necessary to prove payment under the licenses, as they were of such an ancient date, it could not reasonably be supposed that evidence of such payments was still preserved. (2)

But where unexceptionable evidence, of enjoyment referrible to the document, may reasonably be expected to be found, it is required to be shewn. (3) And proof of acting with respect to the documents, which are produced as evidence of acts of ownership, is always scrupulously required, even in cases where traditionary

(1) 1 Campb. 311.

(2) There appears to be a material distinction between evidence of enjoyment under leases by the lessees, and evidence of payment of rent. This distinction is sometimes very important, where subsequent inquiries are made respecting the parcels of the lease. Thus, where leases of rectories include tithes claimed by the vicar, it seems to make an important difference, whether the lessee has enjoyed the tithes claimed by the vicar, or whether he has only paid rent generally on his lease. For it would be the interest of the lessee, as well as of the lessor to have the parcels stated as amply as possible; and where the rights are often so intermingled as those of rector and vicar, the leases of the rectory may often, in general terms, include vicarial tithes, without any imputation of fraud, especially where common forms and precedents are often followed, as in leases of crown rectories. In tithe suits, however, ancient leases of rectories have frequently been admitted as evidence of the parcels, merely upon proof, of rent being received, appearing by the minister's accounts. *Collins v. Gresley*, by Park, J., Derby Sum. Ass. 1833. Per Lyndhurst, C. B., on motion for a new trial.

(3) In *Alcock v. Cook*, tried before Tindal, C. J., at Guildhall, it

was sought to prove a particular district parcel of a certain manor, and evidence was given from the rates of certain persons within that district having been fined and presented. But the Chief Justice rejected the evidence, because it was not proved by the steward's entry, that the fines had been paid. In *Plaxton v. Dare*, 10 Barn. & Cress. 19, where, in order to prove parochiality, certain rates were given in evidence, Lord Tenterden observed, "assuming that it was necessary to prove payment of the rates, there was evidence of such payment." In the case of private leases, evidence of the receipt of rent, shewn by the entries of the lessor, appears to be excluded by the case of *Outram v. Morewood*, 5 T. R. 121. And it would seem, that entries of payments by a corporation in their own books, are equally excluded, *Marriage v. Lawrence*, 3 B. & A. 142; entries that certain persons had been fined, and had paid their fines. On the first trial of the Cambridge toll case, an ancient schedule, produced from among the muniments of the Corporation of Cambridge, was held to be inadmissible, because it was not properly connected with the actual collection of the tolls. This defect was supplied upon the second trial. *Brett v. Beales*, 1 M. & M. 419.

evidence is receivable, if the document purport to have been made *post litem motam*. Thus, upon a question concerning the right of the corporation of Cambridge to receive toll, an award, whereby the freemen of Northampton were discharged of toll at Cambridge, in consideration of an annual payment by the corporation of Northampton to the corporation of Cambridge, was considered as inadmissible in evidence, on the ground that payment of the composition had not been proved. (1)

Proof of modern enjoyment.

But where it cannot be expected, that proof of acting with reference to the documents should be afforded, it is required that some acts in modern times with reference to similar documents, should be proved, or that modern possession or user should be corroborative of the ancient documents. In the case of *Clarkson v. Woodhouse* (2) before mentioned, other evidence of title was given besides the leases. And in *Rogers v. Allen*, above stated, (3) Heath, J., observed, that to give any weight to the licenses produced in that case, it must be shown that, in later times, payments had been made under licenses of the same kind, or that the lords of the manor had exercised other acts of ownership over the fishery, which had been acquiesced in.

Another qualification, to which the admissibility of this species of evidence is subject, relates to the custody of the documents. But this will be more properly considered in the part of the Work, which relates to the proof of written instruments. (4)

(1) *Brett v. Beales*, 1 M. & M. 418. On the production of the corporation books, it appeared that the treasurer of the corporation had not charged himself with the receipt of the money, but had only returned it in arrear. On a previous trial of the same case, an award was rejected, because it had not been acted on. 1 M. & M. p. 416.

(2) *Vide supra*, p. 288.

(3) *Vide supra*, p. 289, payment of rent under leases for the last forty years was proved in this case.

And see as to the point that entries in ancient corporation books are not generally evidence against strangers, *Atty. Gen. v. Corporation of Warwick*, 4 Russ. 222. *Lancum v. Lovell*, 6 C. & P. 441. *Marriage v. Lawrence*, 3 B. & A. 142. *Hill v. Manchester W. W.* 5 B. & Ad. 875. And see as to persons manufacturing evidence in their own favor, *R. v. Debenham*, 2 B. & Ad. 186. *Glynn v. Bank of England*, 2 Ves. 43.

(4) *Post*, part 2. *Clarkson v. Woodhouse*, 5 T. R. 412, n. 3. *Doug.* 189.



## CHAPTER XV.

## OF DYING DECLARATIONS.

**T**HE rule which excludes hearsay evidence has been relaxed, in certain cases, where the information has been given by a deceased person under the immediate apprehension of death. It seems formerly to have been considered, that such evidence was admissible on the ground, that the circumstances, under which the information was imparted, were a guarantee of its truth, sufficient to make it safe for juries to derive their conclusions from such a source. It is obvious that this principle would apply, though perhaps with unequal force, whatever were the subject matter of the declaration ; but according to later authorities, it is now established, that dying declarations are receivable only upon some particular subjects of inquiry. The admissibility therefore, of the evidence depends, in some measure, on grounds similar to those which have been already considered ; and, in some degree, on the peculiar solemnity attending the communications.

In a recent case in the Court of Exchequer, which has been before noticed, (1) and in which it was held that evidence could not be given of the declarations of a subscribing witness to a deed, tending to show that he had forged or fraudulently altered the deed, the authorities for admitting dying declarations were much considered. These authorities are two only in number, and although they had been spoken of by Judges occasionally with approbation, they do not appear to be supported by the deliberate judgment of any Court. Upon a review of the circumstances and grounds of those decisions, as pointed out in the judgment of the Court of Exchequer, and having regard to the manner in which their

♦ In civil cases.

(1) *Vide supra*, p. 22. *Stobart v. Dryden*, 1 M. & Wel. 615.

authority is impugned by that judgment, it may be considered at least very doubtful whether dying declarations would at the present day be receivable in any civil case.

Upon what  
subjects.  
Civil cases.

Previously to this case, it had been the leaning of the Courts in late times, to pay regard to the subject matter of dying declarations, and to confine the admissibility of dying declarations to the narrowest principles, upon which the two authorities, referred to, could be rested. In one of these cases the declaration of a subscribing witness to a bond, who in his dying moments begged pardon of Heaven for having been concerned in forging the bond, was admitted by Mr. Justice Heath (1) as evidence of the forgery, on the authority of *Wright* on the demise of *Clymer v. Littler*, (2) where similar evidence of a dying confession by a subscribing witness to a will had been received by Chief Justice Willes, and afterwards approved of by the Court of King's Bench. But in an action of ejectment, it was determined that the dying declarations of a person as to the relationship between the lessor of the plaintiff and the person last seized of the premises in question, (the deceased not being a relation of the parties,) could not be received in evidence. (3)

(1) Cited by Lord Ellenborough, in *Aveson v. Lord Kinnaird*, 6 East, 195.

(2) 3 Burr. 1244. 1 W. Black. 346, S. C. See 4 Barn. & Ald. 54. The state of mind of the deceased as to his hopes of recovery was not much inquired into; the declaration was made three weeks before his death.

(3) *Doe d. Sutton v. Ridgway*, 4 Barn. & Ald. 53. In the reign of Henry VI. the dying declaration of Lord Say before being put to death by Jack Cade, that he had obtained a release of certain lands by duress, and stating his desire to his confessor that he should urge his wife to make restitution to the party wronged, was afterwards made the foundation of a suit in Chancery against the widow for the purpose of setting aside the release. The bill is printed in the Calendar of

Chancery Proceedings, published by the Record Commission, vol. I. p. 47.

*John Brown v. the Widow of James Lord Say.*

Calendar of Proceedings in Chancery, vol. 1, p. 47.

Bill to set aside a release of lands made by duress of imprisonment to the Lord Say, who, just before he was put to death by Jack Cade, confessed the wrong he had done the plaintiff, and desired his confessor to urge his wife to make restitution.

And afterward the same lord Say knowing himself to be put to death by that horrible and crewell traitour Jakke Cade openly knowleched among other extorcions this matter: requiring and charchying a

Mr. Justice Heath is said to have admitted the evidence in the first mentioned of the above cases on the ground that "if the subscribing witness could have been produced on the trial to prove his handwriting to the bond, he might have been cross-examined as to the fact; so his declaration as to the fact might also be proved in contradiction to a presumption of the due execution of the bond from the proof of his handwriting as a subscribing witness." (1)

And Lord Mansfield, in *Clymer v. Littler*, observed, that the fact came out of the defendants' own examination, to discredit their own evidence, arising from the proof of the deceased's handwriting, and that they made no objection to it at the trial. But that even though it had been upon the examination by the plaintiff (especially as the instrument was all written and witnessed by him, and it gave the premises in question to his wife), as the account was a confession of great iniquity, and as he could be under no temptation to say it, but to do justice and ease his conscience, the evidence was proper to be left to the jury. Abbot, C. J., in commenting upon these two decisions, observed, that the declarations amounted to a confession by the party himself of a very heinous offence which he had committed, and drew a distinction between it and the case before him, (*Rex v. Mead*) when the dying declaration of the prosecutor was for the purpose, not of accusing, but of clearing himself. (2) And Mr. Justice Bayley in comment-

chapeleyn called Thomas Oldhall thenne beyng his confessor that he shuld do his feithfull labour to the wife of the said lord Say that your said besecher spaly myght have restitution and reformation of the said wrongis and oppressions in this matter to hym done.

There is another instance in the same reign of a dying declaration forming the ground of an application to Chancery for the restitution of plate, *ibid.* p. 50. It is worthy of remark, that by the Statutum Wallie, 12 Ed. 1, it is expressed

to be part of the duty of the coroner to come to see not only one slain by felony, or by accident, but also a person severely wounded, whose life was despaired of, and to cause a jury to be summoned on both those occasions. Mr. Barrington observes, that the attendance of the jury in the latter case was to *prevent* the dying words of the wounded person from being evidence. Observations on the Statutes, p. 109.

(1) 6 East, 195.

(2) 2 Barn. & Cress. 607. In a criminal case, where the declaration related to the declarant's own death, it has been received, though

ing upon the same decisions, observed, "that the admissibility of the evidence in those cases seemed to be founded on the circumstance, that the deceased must have been called as a witness if he had been alive, and it would then have been competent to prove, by cross-examination, his declarations; and that the party ought not, by the death of the witness, to be deprived of obtaining the advantage of such evidence." (1)

Upon what  
subjects.  
Criminal cases.

Of late years, the Courts have shown a disposition to restrict the admissibility of dying declarations even in criminal cases; and a principle appears to have been gradually established, which is apparently founded on the *necessity* of resorting to this species of evidence, where the injury inflicted on a party occasions his death; it being commonly found, that in such cases there is little other available evidence to be discovered. A rule has been accordingly laid down, that dying declarations are admissible only where the death of the person, who made the declaration, is the subject of the charge, and where the circumstances of the death are the subject of the dying declaration. (2) It may be observed that, independently of the solemnity of the occasion upon which the communication is made, the subject, in such cases, is one upon which the declarant has peculiar means of knowledge, and the declaration in many instances is similar in its nature to those verbal statements which are admissible as original evidence. (3)

its tendency was to exculpate the deceased from a crime. *Tinkler's case*, 1 East's P. C. 356. Formerly the dying declaration of a pauper respecting his settlement (though a question involving law as well as fact) was held admissible by the King's Bench, but at that period general declarations as to this fact seem to have been allowed. *Rex v. Bury*, Cald. 486. *Appotun v. Dunswell*, 2 Bott. 80. The rule is now established that such declarations are inadmissible. *Rex v. Ferry Frystone*, 2 East, 54. *Rex v. Chaderton*, *ib.* 27. *Rex v. Abergwilly*, *ib.* 63.

(1) In *Doe v. Ridgway*, 1 Barn.

& Ald. 55, and see per Bayley, B., in *Chambers v. Bernasconi*, 1 Cr. & J. 457.

(2) By Lord Tenterden, in *Rex v. Mead*, 2 Barn. & Cress. 607. If a party accused himself by his dying declaration, that declaration would, perhaps, be evidence in criminal or even civil proceedings. See per Lord Tenterden, *ib.* Bayley, J., remarks, that in *Tinkler's case*, *supra*, p. 296, the dying declarations were those of the party who had received poison. 4 Barn. & Ald. 55.

(3) See *R. v. Foster*, 6 C. & P. 325.

Where a prosecution was for administering drugs to a woman pregnant but not quick with child, with intent to procure abortion, her dying declarations were held inadmissible. (1) So in trials for robbery the dying declarations of the party robbed have been rejected. (2) And in an indictment for perjury, it was held that the dying declarations of the prosecutor could not be used, in showing cause against a motion for a new trial, nor could they have been received in evidence at the trial. (3)

It would seem that the declaration of a deceased, in favour of a party charged with his death, are admissible equally as where they operate against him. (4)

Favorable to prisoner.

But it would appear, from the authorities, that it was not so much the subject of the declaration as the peculiar solemnity under which it was delivered, that, originally at least, occasioned the relaxation of the rule which excludes hearsay. Such declarations, says Lord Chief Justice Eyre, are made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn, and so awful, he observed, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice. (5)

Absence of interest.

Impending retribution.

(1) By Bayley, J., *Rex v. Hutchinson*, 2 Barn. & Cress. 608, n. (a.)

(2) By Bayley, J., on the Northern Spring Circuit, 1822. By Best, C. J., on the Midland Spring Circuit, 1822, and by Bolland, B., *Rex v. Lloyd*, 4 Carr. & Payne, 233. The rule however, has only been settled of late years. In Drummond's case, 1 Leach, 378, the prisoner was charged with robbery, and it does not seem to have been thought that the declaration was inadmissible on this account, as it formed no part of the ground of rejection; the declaration, however, of the convict, went to accuse himself, *vide supra*,

p. 294, n. 2. In Scotland, on a charge of abduction, the dying declaration of the woman as to the offender, was admitted both on his trial and afterwards on that of his accomplice. Hume's Commentaries, vol. 2, p. 228, *et seq.* extracts from which are given in 16 Howell's St. Tr. 27, n.

(3) *Rex v. Mead*, 2 Barn. & Cress. 605.

(4) *Rex v. Scaife*, 1 M. & Ro. 551.

(5) In Woodcock's case, 1 Leach, 502, and the Court in Drummond's case, 1 Leach, 337, say, that "the principle on which this species of evidence is received is, that the

Idea of future state.

Although it appear that the deceased contemplated the prospect of inevitable and almost immediate death, yet if it also appear that he had not an idea of a future state, his declarations will be inadmissible; for a principal ground of the admissibility of such evidence is the supposed deep impression of having shortly to render up an account to his Maker. (1) Accordingly the dying declaration of a child, aged four years, was rejected, because it was considered that however precocious her mind, she could not possibly have any idea of a future state. (2) Upon the same principle, it would seem to be allowable to show, that the deceased was not of a character likely to be impressed by a religious sense of approaching death.

Belief and sense of future state.

Equivalent to living testimony.

Attainted convict.

Upon the ground that dying declarations are said to be receivable, because from the circumstances under which they are delivered they are equivalent to the evidence of a living witness upon oath, the dying declarations of an attainted convict have been rejected, as he could not have been admitted to give evidence, if he had been living. (3)

Accomplice.

But as the evidence of an accomplice is admissible against a person indicted for the crime in which he has participated, the dying declaration of a person, who may have been *particeps criminis* in an act which occasioned her own death, were received in evidence, upon an indictment for the murder of herself against a person as principal, and also as accessory before the fact. (4)

mind, impressed with the awful idea of approaching dissolution, acts under a sanction equally powerful with that which it is presumed to feel by a solemn appeal to God upon oath."

(1) *Per Park, J.*, in *Rex v. Pike*, 3 Carr. & P. 598.

(2) *Rex v. Pike*, 3 Carr. & P. 598, by *Park, J.*, and *Parke, J.*

(3) *Drummond's case*, 1 Leach, 337. *Vide infra*, chap. iv. *Disqualification from Infamy*. And yet a pardon will render the convict a competent witness, even in those

cases where conviction disqualifies a man from being a witness.

(4) *Tinkler's case*, 1 East's P. C. 354. The death of the deceased was occasioned by instruments inserted into her womb in order to procure abortion. There was a difference of opinion among the judges as to the point whether the declarations required confirmation; as to which, note *infra*, chap. iv. *Evidence of Accomplices*. *Nares, J.*, at the trial, thought that the objection of the deceased being a *particeps criminis* did not hold as to

The preliminary inquiry, to be made before dying declarations can be received in evidence, is "whether the deceased apprehended, that he was in such a state of mortality as would inevitably oblige him soon to answer before his Maker for the truth or falsehood of his assertions." (1) In arriving at a conclusion upon this inquiry as to the admissibility of the proposed evidence, it is not necessary that the deceased should have explained by any expressions, whether he thought himself likely to live or die. In *Woodcock's* case, it was deemed sufficient to give credit to the declarations, that the deceased had been mortally wounded, and was in a condition which rendered almost immediate death inevitable; and that she was thought by every person about her to be dying. For it was considered a proper inference from such circumstances, that she must have felt the hand of death, and must have considered herself as a dying woman. (2) The same doctrine was held in *John's* case, (3) the Court being of opinion, that if it was reasonably to be inferred from the wound or state of illness of a dying person, that he was sensible of his danger, his declaration would be good evidence. And in *Rex. v. Bonner*, (4) Patteson, J., says, that it is not necessary to prove expressions of apprehension of immediate danger.

Apparent condition of deceased.

the count, in which the prisoner was charged as principal, and expressed himself with some doubt as to its validity, as it related to the proof of the count, in which the prisoner was charged as accessory. The prisoner was convicted upon that count. But the Judges overruled the objection as to the prisoner being *particeps criminis* on the ground stated in the text. In fact, the question, whether the prisoner was principal or accessory, chiefly depended on the declarations, and the tendency of the declarations was to exculpate the deceased from any criminal participation. In the early state trials, it was very common to give in evidence the confessions of convicted traitors against a prisoner. See *Foster's Crown Law*, p. 234.

(1) Per Eyre, Ch. B., in *Woodcock's* case, 1 Leach, 503. This

inquiry seems not to have been very strictly pursued in the earlier criminal trials. See Lord Pembroke's case, 6 Howell, 1325. Lord Mohun's case, 12 Howell, 967. *Bambridge's* case, 14 Howell, 417. 12 Vin. Abr.

(2) *Ibid.* The deceased died in forty-eight hours after making a formal declaration to a magistrate; but she repeated the substance of it till the time of her death. And the surgeons, from the first moment of their being called in, thought it impossible that she could live. She, however, retained her senses till the last moment.

(3) 1 East's P. C. 357. In this case, however, the majority of the Judges thought, there was no foundation for supposing, that the deceased considered herself in any danger. See also *Dingler's* case 1 Leach, 504, n.

(4) 6 C. & P. 386.

In the case of *Rex. v. Spilsbury and others*, (1) it was proposed to give in evidence the dying declaration of a deceased person, and it was proved that, about the time of making the declaration, the deceased was asked, if he thought he should recover, and how he was ; to which he answered, that he thought he should not recover, as he was so very ill. He had been previously insensible, but remained sensible for an hour, and died the next day. The evidence was rejected, on the ground that the Judge did not feel fully convinced, that the deceased had no hope of recovering. The learned Judge observed, that people very often use expressions, to the effect that they shall not recover, who have no conviction that their death is near approaching ; and that if the deceased had felt, that his end was drawing very near, he should have expected him to say something of his affairs or of those who were to have his property, or to give some directions as to his funeral, or that he would have used some other expressions, shewing a feeling or conviction, that his death was at hand. This decision must, it is conceived, be considered only with reference to the peculiar circumstances of the individual case ; but it may properly be regarded as an authority to this extent, that in general the conduct of the deceased, and not merely what he says respecting his condition, must be considered, for the purpose of determining whether it is proper to receive his declarations.

Prospect of  
impending  
death.

With respect to the interval of time, which may have elapsed between the uttering of dying declarations and the moment of death, there appears to be no rule founded on this circumstance alone : nor is it consistent with the principle, upon which dying declarations are received in evidence, (which, as we have seen, depends upon the state of the declarant's mind,) that such declarations should be excluded, if not made within any precise limits of time. It seems, however, that it ought to appear that the deceased believed his dissolution to be impending. And unquestionably the length of time may be a material con-

(1) 7 C. & P. 187



sideration, in forming an inference as to the state of mind of the deceased with respect to his expectation of death, at the time of making a declaration, especially if the deceased has not expressed his sense of his own situation.

In *Woodcock's case*, (1) Chief Baron Eyre lays stress on the circumstance, that the deceased was in a situation which rendered *almost immediate* death inevitable. And in *Rex v. Van Butchell*, (2) Hullock, B., rejected a declaration made on the 10th of May, the deceased having died on the 17th of May, and having stated, before making the declaration in question, that he felt satisfied he should never recover. Baron Hullock is reported to have said, that "the principle, on which declarations *in articulo mortis* are admitted in evidence, is, that they are under an impression of *almost immediate dissolution*. A man may receive an injury, from which he may think he shall *ultimately* never recover, but still that would not be sufficient to dispense with an oath." (3) But in *Rex v. Bonner*, (4) dying declarations of a person were received, which were made on a particular day, when the deceased thought he might have died, and it was said, that the circumstance of his having lived three days longer, did not alter the state of things on the day when the statement was made.

However, upon an inquiry as to the admissibility of a dying declaration, it is necessary to hear all that the deceased has

Expressions of  
deceased.

(1) *Woodcock's case*, 1 Leach, 503, and *vide supra*, p. 295.

(2) 3 Car. & P. 631. The expression "almost immediate," is used by Bosanquet, J., in *Rex v. Crockett*, 4 Car. & P. 544.

(3) In this case the surgeon at the time the deceased expressed his belief that he should never recover, did not himself think that there was danger of death, and endeavoured to encourage the deceased. In *Woodcock's case*, 1 Leach, 503, the deceased died in forty-eight hours after making the declaration before the magistrate which was

received in evidence. In *Clymer v. Littler*, 3 Burr. 1247, the declaration was in the last illness of the deceased, but three weeks before his death. In *Tinckler's case*, 1 Leach, 354, some of the declarations were made on the 12th of July, and the deceased lingered till the 23d, and at one time during this period the deceased thought herself better. In *Mosley's case*, Moody's Cr. C. 97, declarations were received in evidence which had been made eleven days before the death of the deceased.

(4) 6 C. & P. 386.

said relative to his situation, in order to ascertain whether he had that impression upon his mind, which will make his declarations admissible in evidence. (1) In *Rex v. Crockett*, (2) notwithstanding a surgeon told the deceased that there was no chance of her recovery, yet as she said, that she hoped the surgeon would do what he could for her for the sake of her family, the Judge rejected the declarations of the deceased, saying, that her expressions showed a degree of hope in her mind. In *Rex v. Fagent*, (3) it appeared that the deceased had expressed an opinion that she should not recover, and after that she made a declaration, but subsequently on the same day, she asked her nephew if he thought she would "rise again." And it was considered that the declaration was not receivable, because the subsequent question showed, that she entertained hopes of recovery.

Representations to deceased.

*Rex v. Welborn.*

Representations made to the deceased, are often of importance, in inquiring as to the opinions he entertained of his own danger. Upon the trial of Henry Welborn for the murder of Elizabeth Page, by inducing her to take poison, the declaration of the deceased was made to an apothecary within an hour of her death, in consequence of the apothecary telling her, that he must know what she had done, and that she would not live twenty-four hours unless proper relief was afforded. The majority of the Judges were of opinion that the declaration was inadmissible, because the deceased was given to understand, that if she told what was the matter with her, she might have relief, and recover. (4) So in

*Rex v. Christie.*

(1) Per Hullock. B., 3 Car. & P. 631. And see the expressions used in Tinkler's case, 1 East's P. C. 354. And *Rex v. Mosley*, 1 R. & M. C. C. 97.

(2) 4 Carr. & P. 544. The circumstance of a deceased having sent for more medicine after making a declaration, may be considered material, with reference to the enquiry concerning his hopes and apprehensions.

(3) 7 C. & P. 238.

(4) 1 East's P. C. 358. The Judges thought the apothecary's examination of no importance wherein he stated, that at the time the declaration was made, he believed that the deceased thought she was getting well, from being so free from pain, in consequence of mortification; this being, it was said, "mere opinion, unwarranted by fact." It may be observed, that although the expectation of an ac-

the case of *Rex v. Christie*, where the deceased asked his surgeon, if the wound was necessarily mortal, and was told in answer, that persons had recovered under like circumstances, but that the case was one of extreme danger: a statement made immediately after this conversation was rejected by Chief Justice Abbot and Parke, J., on the ground, that the language of the surgeon was calculated to keep up in the mind of the deceased some expectation of recovery. (1)

In the case of *Rex v. Mosley and another*, the deceased *Rex v. Mosley.* received the injury, of which he died, on the evening of the 30th of September, and died on the evening of the 10th of October following. On the first evening, and every day until his death, he complained to the nurse who attended him, that he should never get better. But during his illness he never expressed any opinion either of hope or apprehension to his surgeon. The surgeon informed him, that his case was hopeless, for the first time, on the morning of the 10th of October. The surgeon did not himself consider the case quite hopeless till that day, and had always previously told the deceased, that there was danger, but that there were hopes of his being better. The Judges were unanimously of opinion, that the declarations of the deceased made by him after he was brought home the first evening, after he had said that he should not get better, and also at different times during his illness, and previous to the surgeon's communications to him of his hopeless state, were properly received in evidence. (2) It is to be observed, that this is distinguishable from the two preceding cases, on the ground, that there was positive evidence that the conviction of the deceased, as to his own impending death, had not been altered by the representations of the surgeon.

tual recovery was *unwarranted by fact*, yet that the opinion of the apothecary as to the deceased's state of mind, was probably well founded.

(1) See a brief report of this point in 2 Russel on Crimes, p. 685.

(2) Mosley's case, Moody's C. C. 97, *vide ib.* the particulars of the examinations which run to a

considerable length, *vide supra*, p. 300. *Rex v. Crockett*, where the deceased appeared to have entertained hopes, notwithstanding the surgeon's representations. The surgeon's own opinion does not appear of much consequence in such cases, *vide supra*, Welborne's case, p. 300, n. (4).

In the case of *Rex v. Hayward*, (1) after a surgeon had examined the wound of the deceased, the deceased inquired whether he was in danger; to which the surgeon answered, that he was, and that the only chance of his living was keeping himself quiet; upon which it was contended, that the declarations, made by the deceased, were not made at a time when every hope in this world was gone, and when the party was aware, that he must inevitably answer soon for the truth or falsehood of his statements; but that, upon the surgeon's statement, he must be taken to have had some hope of recovery. On this the Lord Chief Justice observed, that any hope of recovery, however slight, existing in the mind of the deceased at the time of making the declarations, would undoubtedly render the proof of such declarations inadmissible. But upon the further examination of the surgeon, it appeared that, before the declarations were made on the following evening, the deceased knew that he must die, and that the magistrate, previous to the receiving of his declarations, desired him, as a dying man, to tell the truth; and that the deceased replied, he would. Upon this further evidence the declarations of the deceased were held to be admissible, and were laid before the jury.

Manner of  
making declarations.

With regard to the manner, in which a dying declaration may become the subject of legal evidence, it may be observed, that in *Woodcock's case*, (2) an examination taken on oath by a magistrate, and signed by the deceased and by the magistrate, was received in evidence as of the same effect, in point of admissibility, with her declarations not made with the same solemnity. It is no objection in point of law to a dying declaration, that it was made in answer to questions. (3)

Declarations  
reduced to  
writing.

Dying declarations have been admitted in evidence, although

(1) 6 C. & P. 160.

(2) 1 Leach, 500.

(3) *Rex v. Fagant*, 7 C. & P. 238. It appears from the case of *Rex v. Woodcock*, that the declaration may be admissible, though obtained

by pressing, and by questions. The same appears from *Rex v. Reason and Tranter*, 1 Str. 499. But such solicitations must naturally weaken the effect of the evidence.

it appeared that the deceased made a subsequent statement which had been taken in writing before a magistrate, but which written examination was not ready to be produced at the trial. This point was much discussed on the trial of *Reason* and *Trantor*, under the following circumstances. (1) The deceased stated the particulars of the inquiry, which occasioned his death, at three several times in the course of the same day, with an interval of about an hour between each; the first and last account had not been written, the second was reduced into writing in the presence of a magistrate by the same person, to whom the former account had been given; this written statement was retained by the magistrate, but as he had removed to a distant part of the country, and it was not known to what place, the original was not produced, and an examined copy was rejected. An argument then ensued with respect to the admissibility of the first and third statements of the deceased. The Chief Justice, Sir John Pratt, was of opinion, that evidence of the first and third statements ought not to be received, considering all of them as statements to the same effect and forming one entire narration, of which the written examination was the best proof. But the other Judges, (2) were of a different opinion; they held, that the three accounts given by the deceased were distinct facts, and that there was no reason to exclude the evidence as to the first and third declarations, because the prosecutor was disabled from giving an account of the second. The witness was therefore directed to repeat his evidence, leaving the examination before the Justices

(1) 6 St. Tr. 202, 205, S. C. 16 Howell, St. Tr. 31. 1 Stra. 499, S. C.

(2) 1 Stra. 500. The reporter was one of the counsel for the prosecution. From the report in the state trials it would appear that the Chief Justice and Mr. Justice Powis were against receiving the evidence, and Mr. Justice Eyre and Mr. Justice Fortescue for receiving it. The evidence, however, according to that report was at last received. At the time of this trial it does not

appear to have been settled that an examination by Justices of the Peace in the absence of the prisoner was extra-judicial, see Woodcock's case, 1 Leach, 502. As a consequence of the examination being extra-judicial, it would follow that it would not be admissible itself in evidence, at least unless it were signed by the deceased. Whether the written examination, if signed by the deceased, would have precluded parol evidence, *vide infra*, p. 304.

out of the case; and the first as well as the third statement was admitted.

When the declaration has been taken down in writing and signed by the deceased; it has been held, that neither a copy of the writing nor parol evidence of it can be received. (1)

Declaration of opinion.

The statement made by the deceased must be such as would be receivable, if he were alive and could be examined as a witness; any declaration therefore upon matters of opinion, as distinguished from facts, would not be receivable. (2)

Admissibility of declarations. Question of law.

It has been laid down, that when a declaration has been made by a party *in articulo mortis*, the question, whether, under all the circumstances of the case, the declaration is admissible in evidence, is a question exclusively for the consideration of the Court. (3) The question whether any particular piece of evidence be admissible is upon principle always to be determined by the Judge. But in the case under consideration, that question depends on a difficult preliminary investigation of fact, much more within the ordinary province of juries than of Judges; and where the evidence is admitted, it is scarcely to be expected, that juries will pay implicit obedience to the decision of the Judge, founded as it is on a conclusion of fact, a subject upon which the constitution regards them as peculiarly competent to form a right opinion. (4)

(1) *Rex v. Gay*, 7 C. & P. 230, and see *Trowter's case*, 12 Vin. Ab. 118. *East's P. C.* The correctness of these decisions will be better examined after a consideration of the authorities in the chapter upon *Secondary Evidence*, to which they more properly belong.

(2) *Rex v. Sellers*, Carr. Cr. L. 233.

(3) By Lord Ellenborough, in *Rex v. Hucks*, 1 Stark. C. 523. Lord Ellenborough said, that this point had been considered by the judges, on a question proposed to them by the judges of Ireland; and

such was their unanimous opinion. By all the judges in *John's case*, 1 *East's P. C.* 357, and in *Welborn's case*, 1 *East's P. C.* 366. And see *Rex v. Van Butchell*, 3 Carr. & P. 631. *Rex v. Crockett*, 4 Carr. & P. 544, and all the more modern cases.

(4) The matter has been spoken of as an extremely painful one for the Judge to decide upon; per Coleridge, J., in 7 C. & P. 190. The question was left to the jury by Chief Baron Eyre, in *Woodcock's case*, 1 Leach, 502. But the Judge so far decided the point of admissibility, as to receive the evi-

With respect to the effect of dying declarations, it is to be observed, that although there may have been an utter abandonment of all hope of recovery, it will often happen, that the particulars of the violence, to which the deceased has spoken, were likely to have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed. The consequences also of the violence may occasion an injury to the mind, and an indistinctness of memory as to the particular transaction. The deceased may have stated his inferences from facts, concerning which he may have drawn a wrong conclusion, or he may have omitted important particulars, from not having his attention called to them. Such evidence therefore is liable to be very incomplete. He may naturally also be disposed to give a partial account of the occurrence, although possibly not influenced by animosity or ill-will. But, it cannot be concealed, animosity and resentment are not unlikely to be felt in such a situation. The passion of anger once excited, may not have been entirely extinguished, even when all hope of life is lost. (1) If these observations are founded upon the common experience of human nature, it is necessary to be cautious in receiving impressions from accounts given by persons in a dying state; especially when it is con-

Effect of dying declarations.

dence, directing the jury to reject it if they came to a particular conclusion respecting certain facts. It may be observed, however, that the general competency and disposition of juries to discard any piece of evidence from their minds which has been once brought before them, may be questioned. Sir D. Evans, 2 Pothier, 293, contends for the propriety of leaving the whole question of the admissibility and effect of dying declarations to the jury. He says, that "the inquiries connected with the evidence of dying declarations, are first, whether the deceased were really under such circumstances, or used such expressions from which the apprehension in question is correctly inferred. Second, Whether the deceased did make the declarations alleged against the accused. Third, Whether the declarations are to be admitted as sincere and

accurate. It may be observed, that the first of these inquiries is, abstractedly considered, peculiarly proper for a jury; but that it would be dangerous to leave to juries the consideration of the two latter inquiries, upon a contingency to which it is probable that they would, in many instances, pay no regard. It may be observed, that this is not the only instance where it is the province of the Judge to decide complicated questions of fact, as preliminary to the admission of evidence. It is said in 1 Tyrw. 806, that the Judge, in such cases, is not to stop the cause for the purpose of having the preliminary question of fact decided by the jury. The question in that case was one of identity.

(1) In *Rex v. Crockett*, 4 C. & P. 544. The declaration was "that damned man has poisoned me."

sidered that they cannot be subjected to the power of cross-examination,—a power, quite as necessary, for securing the truth, as the religious obligation of an oath can be. The security also, which courts of justice have in ordinary cases, for enforcing truth, by the terms of punishment and the penalties of perjury, cannot exist in this case. (1) The remark before made, on verbal statements, which have been heard and reported by witnesses, applies equally to dying declarations, namely, that they are liable to be misunderstood, and misreported, from inattention, from misunderstanding, or from infirmity of memory. In one of the latest cases upon the subject, this species of proof is spoken of as an anomaly, and contrary to all the general rules of evidence, yet as having, where it is received, the greatest weight with juries. (2)

## CHAPTER XVI.

### DECLARATIONS AND ENTRIES BY DECEASED PERSONS.

**A**N exception to the rule excluding hearsay evidence has been established in modern times, in the case of declarations and entries made by persons since deceased. This exception applies to a description of facts, the evidence of which, being usually confined to the knowledge of a few persons, would frequently be lost, if the strict rule, which excludes hearsay evidence, were enforced. And it will be seen, that by the qualifications, under which this kind of evidence is admitted, many of the general objections to hearsay evidence are ob-

(1) Richard Coleman, A. D. 1749, was executed for the rape and murder of Anne Green. The conviction proceeded on the dying declaration of the prosecutrix. But Coleman's innocence was established two years afterwards, when another person was executed for the same offence upon the clearest evidence. See Mr. Fox's observa-

tions in his history of the reign of James II., upon the dying declaration of Rumbold in 1685, that he had not been concerned in any project for assassinating the King or Duke of York in the Rye House Plot.

(2) Per Coleridge, J., in *Rex v. Spilsbury*, 7 C. & P. 196.



viated. This subject will be conveniently discussed, by considering, first, those declarations and entries, which are receivable on the ground of their operating against the interest of the persons making them, and, secondly, those which are receivable on the ground of their being contemporary entries, in the ordinary course of duty or employment. The two divisions, however, are intimately connected with each other.

## SECTION I.

*Declarations and Entries against the Interest of the Persons making them.*

It is a rule of evidence clearly established, that declarations of persons since deceased (under which term of declarations all written statements and entries are intended to be comprehended,) are admissible, where those persons are to be presumed consant of the subject matter of the declarations, and where the declarations apparently operate against their own interest. (1) It is presumed where declarations are made under these circumstances, that they are entitled to credit, because the regard, which men pay to their own interests, may safely be considered as a sufficient guarantee against their prejudicing themselves by any *erroneous* statement, and the assumed tendency of the declarations precludes the possibility of any *fraudulent* statement. Indeed the apprehension of fraud in such cases is in a great measure removed without reference to the

General rule.

Principle of admission.

(1) By the Master of the Rolls, in *Short v. Lee*, 2 Jac. & W. 464. By Bayley, J., in *Roe v. Robson*, 15 East, 34. By Parke, J., in *Middleton v. Melton*, 10 Barn. & Cress. 328. The *dicta* of the Judges do not seem to require *peculiar* means of knowledge in the declarants; nor to point out a necessity, that the declarations should be connected with the facts to which they relate,—as the possession of land, or some course of business, or the performance of some ordinary duty; though these circumstances are generally to be found in the cases. Nor does it seem requisite, that the

declarations should have been made by persons in the course of any business or employment; and it seems that declarations against interest need not be contemporaneous with the facts to which they relate. By Parke, J., in *Doe v. Turford*, 3 Barn. & Ad. 890. By the Master of the Rolls, in *Short v. Lee*, 2 Jac. & W. 464, where it was said that it is not necessary, in the case of collectors' books, to produce the very paper they collected by. That the declaration of a living person against interest cannot be received. *Spargo v. Brown*, 9 B. & C. 935.

fact of the declarations being against interest, when it is considered that declarations are not receivable during the life-time of the authors of them; and that it is always competent for the party, against whom they are produced, to point out any sinister motive for making them. It is true, the great tests of the fidelity, accuracy, and completeness of judicial evidence, are here wanting. But the inconveniences which would result from the extinction of evidence are considered as outweighing, in the generality of cases, the inconvenience of admitting such hearsay declarations, under the limitations and securities above mentioned.

It will perhaps be thought, in many of the decisions respecting the rule under consideration, that the interest of the party was so slight as to produce little, if any effect. And it would seem that the Judges, from an apprehension of extinguishing the truth by rejecting evidence, have, in many instances, been contented with very unsatisfactory presumptions, as to the fact of the party's interest being opposed to his declaration.

In some cases, the Courts appear to have considered declarations to be admissible, without proof that the party making them had any actually existing interest, which could be lessened or endangered. (1) Hence, a declaration, accompanied by an admission apparently against interest, would be receivable, although, in point of fact, the author of the declaration did not compromise his interest at all, but only made an admission apparently against interest, and without any real transaction to which it could relate, in order to render his declaration receivable. In several of the cases decided upon this subject,

(1) See the cases collected in *Barker v. Ray*, 2 Russ. 67, n. In a few cases, where the facts admitted of it, the Judges have laid stress on the circumstance, that the entry was proved by extrinsic evidence to have been made against interest. Thus, in *Higham v. Ridgway*, 10 East, 109, Lord Ellenborough observes, that the midwife had an interest not to discharge a claim, which it appears *from other evidence*, he was entitled to. And

in *Doe v. Vowles*, 1 Mo. & Rob. Littledale, J., rejected a tradesman's receipt apparently on the ground that it did not appear *aliunde*, that he was entitled to make a charge. In *Crease v. Barrett*, 1 Cr. M. & R. 919, it was considered necessary to prove a person in possession of land, before his declaration could be used as being against the interest of the occupier.

the inference, of the declarations being against interest, appears to have been on the unwarrantable assumption of the existence of real facts as a foundation for the statement; and the accuracy of the declarations has been inferred from a supposition, that the persons making an entry must have been particularly cautious in the statement of all its details, as precluding themselves from afterwards attempting to set up an unrighteous demand.

The Courts have in numerous instances been satisfied that declarations were against interest, where they have been made in private books retained within the custody of their owners, and not, as in the case of receivers' accounts, subjected to the inspection of others. (1) In such cases, the declarations could only have been available against interest in the event of accident or mistake, or possibly in case of receiving notice to produce books on a trial. (2) Under such circumstances, a regard to self-interest appears to be not a sufficient guarantee against fraud, and a very inadequate one against negligence or mistake.

It is to be observed, that, without knowing what proofs existed of a particular fact, it is impossible to estimate properly the value of an admission. A declaration may, on the face of it, appear to be more adverse in one respect than beneficial in another, yet this may not be really in a case, where the admission apparently adverse is of a matter which was notorious.

(1) As in *Higham v. Ridgway*, 10 East, 109, *infra*, p. 326. In *Middleton v. Melton*, 10 Barn. & Cress. 328, *infra*, p. 311, the collector collected by the book in question, from which it might have become notorious that he had such a book; but this circumstance was not noticed by the Court. The remark in the text does not apply to the books or accounts of receivers and stewards which are ordinarily submitted for the inspection of their employers, and according to the entries in which they engage to account, and frequently appear to

have accounted. Nor to the accounts of public officers, as churchwardens, *Stead v. Heaton*, *infra*, p. 327.

(2) In *Roe v. Rawlins*, 7 East, 290, Lord Ellenborough says, "If this paper *had ever met the eye*, it might have been used adversely." It may be observed on the other hand, that the probability of a private book meeting the eye, might operate to induce a person to give a colour to the circumstances connected with a receipt, where the receipt could not be denied.

It is, for example, often capable of the strictest proof, that a particular payment has been made; but the ground of the payment may be matter of controversy, which the party acknowledging may have an interest to attribute to one ground rather than to another.

Although it is true, that a person is not allowed to avail himself of his own declarations in evidence, and that the cases may be few and peculiar in which they can be available for his representatives; yet there may be a strong suspicion of bias, at least, when the entries may be made available for parties standing in *pari jure* with the declarant. And where no motive of interest can be suggested, yet the declarations may be influenced by feelings equally likely to occasion misrepresentation. The circumstance, that the declarations are against a person's own interest, affords a very insufficient guarantee of fidelity and accuracy, unless it clearly appear, not only that a particular fact stated in the declaration, but the whole declaration, in every view of it, is prejudicial to the interest of the maker; and unless it appear, further, that the means will be afforded to others of using the declaration against him, and that others will probably have occasion so to use it.

The doctrine concerning declarations against interest appears to have been extended somewhat beyond the reason upon which it is founded, in those cases where the person making the declaration could not have promised himself any advantage, either by omitting to make it, or by stating it in a different way. It will appear, in many of the cases, that no sacrifice of interest was incurred by making the declaration, but the prejudice to the maker consisted merely in affording the possible, but very improbable means, of confuting an unjust claim, which it must be supposed highly improbable would ever be set up. It may be observed, that, whether the circumstance, of a declaration being against interest, be a fit criterion or not for it's admissibility, the credit and weight due to such a declaration will materially depend on it's having been made in the course of business, and under the circumstances which form

the subject of consideration under the next section of this chapter. It is, however, clearly established, that declarations of persons, contrary to their interest, at whatever time made, are, after their deaths, receivable in evidence. (1)

The occasion, upon which the exception, to the rule for the exclusion of hearsay testimony, has been most commonly applied, is where the evidence consists of entries of the receipt of money, whereby the deceased person has charged himself as being accountable for the money received. Entries, so made, are evidence of the fact of the receipt of such money. Thus, where an entry was made by a deceased collector of taxes, though in a private book kept by him for his own convenience, whereby he charged himself with the receipt of sums of money, the entry was held to be admissible evidence to prove the fact of the receipt of the money in an action between third persons, agreeably to the general rule above stated. (2)

Receipt of  
money.

(1) In many of the authorities another qualification is introduced, that the person, whose declarations are received, must have had peculiar means of knowledge. The rule as expressed in the text supposes them to have had a personal interest in the transaction, and it will be seen that it is not essential that the subject of the declaration cannot be proved by living witnesses or other evidence. It is sometimes said that declarations must not only be against interest, but that the declarant must have no interest to misrepresent the fact. But it would seem, that if upon the whole the declaration was against the interest of the declarant, it would be receivable.

(2) *Middleton v. Melton*, 10 Barn. & Cress. 317, referred to by Bayley, B., 1 Cr. & J. 456. The action was brought against the surety of the collector, on a bond conditioned for the due payment of taxes by the collector. But the Court decided the case on the ground of the general rule in the text, disregarding all reference to the circumstance of

any privity between the deceased and the defendant. In *Goss v. Watlington*, 8 Barn. & Cress. 556. *Whitnash v. George*, 3 Brod. & Bing. 132, the judgments proceeded on the ground, that entries had been made in a book, which it was the duty of the principal to keep, and for the performance of which duty the defendant had become surety; and the decisions in those cases were founded principally on that circumstance. In *Middleton v. Melton*, the entries were in a private book kept for the collector's own convenience. And the Court, in the latter case, observed, that they thought the two former decisions might be supported on the more general principle. In *Middleton v. Melton*, the act was incomplete from there being no entry in the public book, whereas in the other cases upon this subject, the entries were all that was intended to be done by the parties making them. But this circumstance, it was considered, did not affect the principle, on which the entries were admitted. By *Littledale, J.*, 10 Barn. & Cress. 326.

Stewards'  
books.

The acknowledgments by deceased stewards, reeves, and bailiffs in their books, of the receipt of money for which they have been accountable, are very frequently adduced in evidence by their employers, or those claiming under them, or by strangers. (1)

But it ought clearly to appear, that the effect of the entries was to charge the bailiff or steward. In an action for copyhold fines, the book of a deceased steward of a manor was tendered in evidence, containing entries of assessments of fines, as well those which had been paid as those which had not; and it appeared, that the steward made up a book at the end of each year, in which book he put down the fines that had been actually paid. The former book was rejected, on the

The entries of the names of persons and sums assessed in the private book were copied from a duplicate assessment; and it was the collector's practice to collect by that private book, and to mark with ticks all the sums he received; he then entered receipts into the duplicate assessment; but the receipt of the sums, for which the action was brought, though noticed in the private book, had not been entered in the duplicate assessment. The evidence is not receivable on the ground of it's being an admission, and therefore it would not be evidence except in the case of the death of the person making the entry. *Smith v. Whittingham*, 6 C. & P. 78. *Spargo v. Brown*, 9 B. & C. 935.

(1) See the case of *Barry v. Bebbington*, 4 T. R. 514, stated *infra*. *Edwards v. Rees*, 7 C. & P. 340. *Manning v. Lechmere*, 1 Atk. 453. Entries by bailiffs or stewards often acquire additional credit from the circumstance, that such entries would, in the ordinary course of business, be expected to be kept, and that the fact recorded is in some measure to be presumed from the existence of the entry. And the accounts of stewards seem to be of greater credit than entries in

private books, inasmuch as they are usually subjected to inspection, and are the foundation of transactions between the steward and his employer. That this is a usual mode of proving payments under old leases and licenses, see 1 Camp. 310, respecting receipts of tithe collectors. *Wynne v. Tyrwhit*, 4 Barn. & Ald. 376. *Manning v. Lechmere*, 1 Atk. 453. By Lord Ellenborough, in *Higham v. Ridgway*, 10 East, 116. *Harper v. Brooke*, 3 Woodeson's Lect. 332. Vin. Ab. Ev. A. b. 15. *Bullen v. Michel*, 2 Pr. 413, in which case the accounts were accounts of the reeve of an abbey, allowed by the bailiff of an abbey, and Chief Justice Gibbs observed, that the charging side was against the interest of the reeve, and the discharging side against the interest of the bailiff. He seems also to have thought, that the discharging side could also have been evidence as part of the same account. In *Finch v. Messing*, cited in *Short v. Leigh*, 2 Jac. & W. 464, the accounts of a sequestrator were given in evidence, which contained a charge and discharge. *Bree v. Beck*, 1 Younge's Ex. Ca. 225, 239. *Doe v. Tyler*, 6 Bing. 562.

ground, that it did not appear to contain any evidence that the steward had charged himself. (1)

Accounts of this nature are commonly produced from the muniments of the persons to whom the accounts were rendered, and when this is the case, they amount to proof, that the person rendering them has actually put it into the power of his employer to use them against him, as evidence of money had and received to the employer's use. This circumstance appears to entitle them to much greater credit than is due to entries in private books, which have never passed into the custody of persons interested to make use of them against the makers of the entries. (2) Such a test of the authenticity and accuracy of the entries is, however, not essential to their being admitted in evidence, as appears by the preceding cases, and others which will be presently cited. As far indeed, as regards the entries to be found in the books of some particular classes of persons, for example, the books of attornies, (3) they may derive some additional weight from the circumstance, that the parties would be expected to keep books, and to produce them upon notice.

Conformably with this rule, receipts for the payment of money, given to the person making the payment, appear to be admissible, after the death of the receiver of the money, to prove the fact of it's having been received, though there exist no privity between the deceased and the party against whom the evidence is tendered. In the case of *Middleton v.*

Receipts.

(1) *Dean and Chapter of Ely v. Caldecott*, 7 Bing. 434. It would seem probable that the steward, by entering an assessment of a fine, without stating it to be paid, prejudiced his interest by supplying evidence of an obligation on himself to collect the fine. But then the entry would merely prove the fact of assessment, which would not be material, unless the fine were paid. In *Brett v. Beales*, 1 M. & M. 418, where the treasurer of a corporation had returned mo-

ney in arrear, the entries were rejected, because he had not charged himself with the receipt of the money.

(2) The like observations apply to the cases of the accounts of public officers, as churchwardens. *Stead v. Hutton*, 4 T. R. 669.

(3) See *Warren v. Greenville and Doe v. Robson*, *infra*. *Rowcroft v. Bassett*, Peake's Add. Cases, 199. *Gale v. Packington*, M'Cl. & Y. 357.

*Melton*, (1) the Judges of the King's Bench were of this opinion, though the decision in that case was rested upon other grounds. In a previous case, however, of *Goss v. Watlington*, (2) the Court of Common Pleas appear to have been of a different opinion upon this point, under similar circumstances. In the suits, the receipts of collectors of former incumbents are considered very strong evidence of the facts they record. (3)

(1) 10 Barn. & Cress. 321. In *Harrison v. Blades*, 3 Camp. 458, Lord Ellenborough said, that a tax-gatherer's receipts would be evidence after his death to prove who was the occupier of certain premises. It is said, by Scarlett, arg. in *Barker v. Ray*, 2 Russ. 70, that the constant practice of *Nisi Prius*, shews that receipts by persons who are dead are not evidence as between third parties, that money was paid. And see an argument in *Chambers v. Bernasconi*, 1 Cr. & J. 456, that receipts of deceased persons are only evidence, where those persons were accountable for what they received. In *Harrison v. Blades*, 3 Camp. 458, where a tax-gatherer's receipts were rejected, because he was not dead, but only ill; Lord Ellenborough appears to have entertained no doubt, but that they would have been evidence to prove occupation, after the tax-gatherer's death, see *Manning v. Lechmere*, 1 Atk. 453. In *Doe v. Vowles*, 1 Mo. & Rob. 161, Littledale, J., rejected a deceased tradesman's bill, for repairs, with a receipt thereon; the question being one of adverse possession between mortgagor and mortgagee, and the receipt came from the papers of the mortgagee. Littledale, J., said that the cases had gone quite far enough. Receipts appear to be much less objectionable testimonies than entries in private books, from the circumstance of their having been given to persons interested to preserve them as evidence against the makers.

(2) 3 Br. & B. 138. This point, however, was not very material in

the case in the text, as the Court decided that the collector's books were receivable. The Court appear to have directed their attention solely to the grounds on which the declarations of agents are receivable or not against their principals. This decision as to the receipts was adverted to in *Middleton v. Melton*, 10 Barn. & Cress. 328, and the propriety of it doubted.

(3) These receipts, on account of the want of privity, cannot perhaps be strictly considered as in the nature of admissions; though they are very analogous to some cases, in which judgments or admissions are admissible, on account of a privity of estate, especially as a judgment against a rector or vicar would be admissible against his successor, *vide infra*, part 2. The receipts are made by persons *in eodem jure*. The principal cases respecting tithe receipts are *Lake v. Skinner*, Gw. 1931. 3 E. & Y. 976. *Jones v. Carrington*, 1 Carr. 327, 497. *Ekins v. Dormer*, 3 Atk. 534. *Chapman v. Smith*, 1 Ves. 511, in which two latter cases, Lord Hardwicke remarks as to practice of parsons abstaining from the use of the term *modus* in their receipts; and the like observations on the language and effect of receipts will be found in *Manby v. Lodge*, 9 Pr. 231. *White v. Lisle*, 4 Madd. 214. *Duffield v. Orrel*, 6 Pr. 324. *Deacle v. Hancock*, M'Clel. 85. *Taylor v. Fox*, 4 Wood, 322. *Chapman v. Smith*, 2 E. & Y. 141. On discrepancies between early and late receipts, *Manby v. Lodge*, 9 Pr. 231; receipts of churchwardens for a



The occupation of premises by a particular individual at a certain period has been allowed to be proved by entries in a land-tax-collector's book, stating that individual to have been rated for the premises in question, and to have paid the rate, on the ground, that the entry of payment was made against the interest of the collector. (1) In *Plaxton v. Dare*, (2) upon a question whether premises were situate in a particular parish, the accounts of deceased overseers, in which there were crosses made against the names for which the tenants of the premises had been assessed, were held to be evidence of actual payment of the rates. Rate books.

Not only declarations of the receipt of money, but declarations of a variety of descriptions, made against interest, have been received in evidence. (3) Thus, upon an issue whether A. B. died possessed of certain farming stock; it has been held, that evidence might be given of a conversation in which A. B. stated that she had retired from business, and had given up her farming stock to her son-in-law. (4) A bill of Right to property.

tributary modus, *Atkins v. Drake*, 1 M'Clel. & Y. 217. It is said by Baron Wood, in *Robinson v. Williamson*, 9 Pr. 136, that receipts are stronger evidence than vicars' books, 1 Younge's Ex. Ca. 165. The absence of receipts is not a circumstance of great weight against the existence of a modus, see *Wooley v. Brownhill*, M'Clel. 335.

(1) *Doe d. Smith v. Cartwright*, R. & M. 62. It would seem from this case, that the rate alone (though of the nature of public documentary evidence), was not evidence of occupation; and see *Harrison v. Blades*, 3 Camp. 458, tax-gatherer's receipts.

(2) 10 Barn. & Cress. 19, *vide ib.*, as to the necessity of proving payment in such a case. It was said, that the making of crosses was a common mode of denoting payment.

(3) See the cases collected in the note to *Barker v. Ray*, 2 Russ. 67. See also the next section for cases respecting indorsements of pay-

ment of interest upon bonds and notes.

(4) *Ivat v. Finch*, 1 Taunt. 142. On a motion for a new trial, it appeared that the Judge at nisi prius, had rejected the evidence, on the ground that the declaration was not accompanied by any act relative to the management of the farm. It would seem that although declarations accompanying acts may be explanatory of the acts, they do not derive additional credit from that circumstance as to matters totally unconnected with the acts which they accompany, except so far as they may be thought more deliberate. Perhaps the case may in some measure be considered as resting on the doctrine of admissions on account of the privity between the lord of the manor, and his tenant. Chief Justice Mansfield, after stating that the admission was against interest, concludes his judgment by saying, "It ought, *therefore*, to have been received; *because* the right of the Lord of the Manor depended upon her title."

lading signed by a master of a vessel, since deceased, for goods to be delivered to a consignee or his assigns, on payment of freight, has been held to be admissible evidence of the consignee having an insurable interest in the goods. (1)

**Declarations  
by occupiers.**

In several cases the declarations have been made by tenants, where they have stated that they paid rent to particular persons. In these cases, the declarations have been considered as made against interest, inasmuch as possession is *prima facie* evidence of a seisin in fee, and therefore, the declaration of the possessor, that he is tenant to another, makes against his interest. (2)

Thus in *Davies v. Pierce*, (3) upon a question whether the

(1) *Haddow v. Parry*, 3 Taunt. 303; see the opinions of the Judges in the course of the argument. In this case, it appeared, on further inspection of the bill of lading, that it contained in the margin, the words "contents unknown," and it was considered that, by the insertion of these words, the master could not charge himself with anything, and would not be accountable. In general, an invoice is only evidence against parties privy to the contents. *Shendom v. Thompson*, 1 St. C. 316. *Dicken v. Lodge*, 1 St. C. 226.

(2) By Chief Justice Mansfield, in *Peaceable v. Watson*, 4 Taunt. 16. Possession is *prima facie* evidence of ownership, and a tenant's declaration is evidence, as cutting down the fee. It would seem that these declarations of occupiers were admissible, also, as explanatory of the fact of occupation. *Doe v. Pettett*, 5 Barn. & Ald. 223. By Lord Tenterden, though, perhaps, in that case the declaration of the occupier went to cut down the fee. And see the argument of counsel in *Chambers v. Bernasconi*, 1 Cr. & J. 457. In *Garnem v. Barnard*, Anstr. 298. Macdonald, C. B., seems to have considered that the admissibility of the declarations of deceased persons was chiefly confined to the case of tenants making

statements concerning the nature of their holdings.

(3) 2 T. R. 53. Ashurst, J., decided the case on the ground, that evidence had been rejected, of the occupier having in one instance prevented a person from cutting rushes, threatening at the same time, to tell (his landlord) the individual in question, and having in another seized rushes cut upon the place in dispute, saying at the same time that they belonged to that individual. Mr. J. Buller, the only other Judge who delivered an opinion, said, the question, relative to the tenant declaring that he paid rent for the premises in question, had been determined by the cases of *Holloway v. Rakes*, which he cited from MS., and *Doe v. Williams*, Cowp. 621. Mr. J. Buller, did not advert to the particular terms of the declarations in *Davies v. Pierce*, or to the circumstance that they accompanied acts done. The case of *Holloway v. Rakes* would seem to have been a case of admissions. In the case of *Doe v. Williams*, upon a question, whether A. B. deceased, was seised of premises at the time of a fine levied, a conversation between him and a living tenant was given in evidence, wherein the one admitted the payment and the other the receipt of rent. The jury and the

place in dispute was parcel of a particular tenement, the declarations of deceased persons, whilst in the occupation of the place in dispute, that they paid rent for the premises to a particular individual, were held to be receivable in evidence. In *Peaceable v. Watson*, (1) it was held, that, in order to prove seisin of certain premises in a particular individual, it was competent to ask a witness, whether a deceased person in occupation of the premises had been heard to say, of whom he rented them. In *Doe d. Baggeley v. Jones*, (2) in an action of ejectment brought for the recovery of a garden, where the question was whether the ground in dispute was parcel of certain freehold property, or of a certain copyhold tenement, a paper signed by a deceased owner of the copyhold tenement, who was also in the occupation of the ground in dispute, in which he stated that no part of the garden was copyhold, and that he paid rent for it, was held to be admissible evidence to prove that the garden was not copyhold. Lord Ellenborough observed, that the representation was against the interest of the maker of it, as he charged himself with the payment of rent, to which he would not have been liable, had the garden been parcel of his own tenement. (3)

Court decided, upon the general merits, against the party producing evidence of this conversation, and the point of the admissibility of the evidence appears to have undergone but little consideration. In *Strode v. Winchester*, 1 Dick. 397, parol evidence of the declarations of a devisee were admitted, to prove her being only a trustee. In *Walker v. Broadstock*, 1 Esp. 458, the declaration of an occupier, that his cattle had been impounded in a particular place was received. And it was said, that the declarations of occupiers against their own rights were admissible. And see *Doe v. Green*, Gow. 227.

(1) 4 Taunt. 16, than by such acts.

(2) 1 Camp. 367.

(3) In the case of *Walker v. Broadstock*, 1 Esp. 458, it was stated by Lord Kenyon, that the declara-

tions of occupiers were evidence against their own rights. This case may be supported on the ground of the declarations of occupiers being admissible as explanatory of the fact of possession, or, perhaps, more satisfactorily on the ground of the admissions being made by privies in estate, *vide infra*; it seems difficult to support it on the broad principle stated by Lord Kenyon; for one of the declarants was alive. The question was concerning the existence of a prescriptive right of common, and a deceased occupier of the plaintiff's property had, during his occupation, said, that his cattle had been impounded on the place in dispute; and a living occupier had, during his enjoyment, declared, he believed that no right of common belonged to the property.

In the case of *Barker v. Ray*, the declarations of a wife during coverture were adduced, after the death of her husband; they were to the effect that her husband was not seised in fee of certain premises in dispute, of which he was then in possession; and that upon a certain event they were to go over to another branch of the family. These declarations were rejected at *nisi prius*, and it was contended, upon appeal to the Lord Chancellor, that the declarations were against interest, as their tendency, by shewing that the husband was not seised in fee, was to prejudice any claim that the wife might make to dower. The Lord Chancellor refused a new trial, not expressing any decided opinion as to the admissibility of the evidence. (1)

In the case of *Roe d. Bruns v. Rawlins*, (2) upon a question whether the lease of a tenant for life, having a limited power of leasing, was void, in consequence of the ancient rent not being reserved, the particulars of a certain estate were received in evidence under the following circumstances. The contents of the paper containing the particulars shewed, that it had been written by a person having an intimate knowledge of the property in question, and who was in the confidential employ of the person to whom the paper was addressed. The paper was in some degree recognised as authentic by the person to whom it was addressed, by his indorsement written upon it "from Hobart, a particular of my estate in Cornwall." It shewed the existing rent of a particular tenement, the ancient rent of which was the subject in dispute. The paper was addressed to the person who was tenant for life of the property, with a

(1) 2 Russ. 77. It was contended on the other hand, that the wife did not appear to have had a competent knowledge of her husband's title; nor was it her duty to know it, and that she had no actual title to dower.

(2) 7 East, 279. Lord Ellenborough observed, that if the tenant for life who disputed the lease, had derived his title from the per-

son by whom the indorsement was made, the case would have been quite clear. It is presumed, this was said with reference to the doctrine of admissions by parties in privity. In the judgment, a broader ground is taken for the admission of the evidence, viz. peculiar means of knowledge, and an absence of interest.

leasing power upon condition of reserving the ancient rent, being the like power to that under which the lease in issue had been made. The paper was preserved among the muniments of the estate by the person to whom it was addressed, and from him it came to the tenant for life whose lease was in issue, and upon his death it passed with the other muniments of the estate to the succeeding proprietor, who questioned the validity of the lease. Lord Ellenborough, in delivering the judgment of the Court, said, the contents of the paper were adverse to the tenant for life to whom it was addressed, and who had authenticated it and preserved it among his muniments,—for it diminished his interest in the renewal, in the same proportion as it raised the rent to be reserved,—and it could not have been evidence in his favour; he could not, therefore, have had any undue motive for preserving it: consequently it was proper evidence, to be left to the jury, of the amount of the ancient rent received.

In the late case of *Carne v. Needle*, (1) it was considered an established doctrine of evidence, that declarations by a person in possession of premises, tending to cut down his own title, (as, in that case, by stating the party under whom he held,) were admissible in evidence. In *Crease v. Barrett*, (2) it was observed, that an occupier, proved to be in possession of a piece of land, is *prima facie* presumed to be owner in fee, and his declaration is receivable in evidence, when it shews that he was only tenant for life or years.

But the declarations of a person who has parted with his interest in land, (as, by executing a settlement,) cannot be adduced for the purpose of impairing the rights of persons acquired under the settlement, (3) merely because they affect

Occupation determined.

(1) 1 Bing. N. C. 430, and see by Lord Lyndhurst, in *Chambers v. Bernasconi*, 1 Cr. & J.

(2) 1 Cr. M. & R. 931.

(3) *Doe v. Webber*, 1 A. & E. 740, and see the cases of declarations by persons whilst in possession

of bills of exchange. *Infra*, Ch. on *Admissions*. In *Doe v. Webber*, the declaration would appear to have been against interest, independently of its affecting the title to the land; the evidence was, however, rejected.

Proof of occupation.

the title to the land. It seems necessary, in order to make the declaration of a deceased person admissible as being an occupier of land, to prove the fact of his occupation; it is not enough that the declaration purport to be against the interest of the maker. (1)

Balance of interest.

It would seem not to be sufficient, that in one or more points of view a declaration may be against interest, if it appear upon the whole, that the interest of the declarant would be rather promoted than impaired by the declaration. Thus, in *Outram v. Morewood*, (2) in an action of trespass for breaking and entering a particular close, it became material to identify the close, concerning the right of digging coals in which the dispute arose, as being parcel of an estate, out of which certain rents had been reserved in an ancient conveyance. The party who sought to do this, produced the books of a person under whom he derived title to those ancient rents, in which that person acknowledged the receipt of rents from the person, who had conveyed the close to the plaintiffs, which rents corresponded with the rents that had been anciently reserved. (3) This evidence was held to be inadmissible by the Court of King's Bench. It may be observed, even supposing according to the authorities that there was reasonable probability of the entry being used against the maker, for the purpose of proving the payment, still if it could be used by the representative of the maker to prove title to the land, the entry might, upon the whole, be in favour of the maker's interest. (4)

(1) *Crease v. Barret*, 1 Cr. M. & R. 931. Slight evidence, as of felling timber, has been held sufficient. 5 C. & P. 575. This principle does not appear to have been uniformly acted upon; see the cases collected in *Barker v. Ray*, 2 Russ. 67 n.

(2) 5 T. R. 121.

(3) The justification was that of having a right to dig coals in the *locus in quo*, and the ancient conveyance reserved coals as well as rents; the defendant derived title to the rents, but not to the

coals, from the person whose book was produced.

(4) The Court does not appear to have treated this case as one of a balance of interest, though in fact it was so, according to the numerous authorities, in which private memoranda, containing receipts of money, have been received in evidence. Nor does the Court appear to have considered, whether the evidence could be received as a contemporary entry in the course of business, nor whether the book would have been admissible, if

But entries of receipt of rent, made by a deceased executor, who had an interest in land which was claimed, have been held admissible evidence for a person claiming the land under him, where the rent has been received and accounted for by the deceased in his capacity of executor, the entries not having been made by him in his character of landlord. (1)

Where certain entries of receipt of money, made by proctors, who were members of an ecclesiastical corporation, were adduced in evidence by that corporation, in a suit commenced by them for tithes, it was held that the proctors were interested against the entries, because they charged themselves with the whole amount, whereas as members of the corporation they had only an interest in a proportionate share of the monies receivable. (2)

It frequently happens, that an entry purports, in the first place, to charge a deceased person, and afterwards to discharge him. In such a case the entry cannot be used against the maker of it, unless the whole is read in evi-

Charge and  
discharge.

produced by a party not claiming under the person making the entries. The case is certainly distinguishable from most of the former decisions, on the ground, that the entries *might* have promoted the interest of persons claiming under the makers of them, though, in some of the preceding cases, this view of the subject has been overlooked. The Court appear to have directed their attention principally to the distinguishing of the case, from the decisions respecting hearsay evidence of general rights.

(1) 9 Bing. 690.

(2) *Short v. Lee*, 2 Jac. & Walk. 464, and a MS. ruling of Lord Ellenborough there cited. The Master of the Rolls asks, "Could the proctors be suspected of wrongly setting down what they had not received, in order that they might, by charging themselves with 2*l.* receive 1*l.* back again?" It may be observed, however, that the effect of the evidence was to make

the 2*l.* payable annually in *perpetuum*. And it would be the interest of the corporation to connive at one of their body fabricating such entries; in which case, he would receive no real prejudice, but perhaps an actual benefit, and the permanent interests of the body would be promoted. But the entries could not be used during the life of the proctor making them, and his personal representatives would have no interest after his death. *Vide ib.*, as to the mode of allowance of stewards' accounts. That bursars' books have been received. *Anon.* Lord Raym. 745. Per Holt, in *Smart v. Williams*, Camb. 249. 12 Vin. 88. The general rule is, that corporation books are not evidence for the corporation, 3 B. & A. 142; 2 B. & A. 189; 4 Russ. 222; 1 M. & M. 417. The case of *Marriage v. Lawrence*, 3 B. & A. 142, was an entry of payment.

dence. But still if the whole were read, the jury would most probably attribute greater weight to the part which was against the interest of the maker, than to that which was in his favor. (1) In several of the cases which have been cited, the entry consisted of a memorandum of payment for work or services performed, and therefore may be said to have been, to a certain extent, in favor of the person making the entry.

**Clerical books.** There is a very remarkable class of cases, according to which, entries, made by a deceased parson, of the receipt of ecclesiastical dues, have been received in favor of parties claiming the same interest as the maker of the entries. Thus, the books of a deceased rector or vicar have been frequently admitted as evidence for his successor. (2) After it has been determined, that evidence may be admitted of receipts of payment, entered in private books by persons who are not obliged to keep such books, or to account to any one for the sums they receive, it does not seem any infringement of principle to admit evidence of rectors' or vicars' books. For the entries cannot be used by the parsons themselves, and there is no legal privity of interest between them and their successors. (3)

(1) *Vide supra*, p. 312, n. 1. *Doe v. Tyler*, 6 Bing. 562. In a recent case, a person deceased executed a feoffment, in which was recited, that he was indebted to another in a certain amount, and that the feoffment was made in consideration of the debt. A discussion arose, whether proof of the execution of the feoffment afforded evidence of the existence of the debt. It was contended, that the statement was not upon the whole against interest; the point was not determined.

(2) *Armstrong v. Hewitt*, 4 Pr. 216. Entries of payments for tithe hay: the books are spoken of by the Court as strong evidence. *Parsons v. Bellamy*, 4 Pr. 190, where the memorandum contained a long detail of facts incident to a receipt of payment of a demand with costs, and the Court said that the memorandum was admissible, because it had the effect of making the vicar charge himself with the

receipt of money. *Walker v. Holman*, 2 Price, 171, where the receipts shewed that the money payments were regulated by the poor's rate. *Perigal v. Nicholson*, Wightw. 63, where a rector's entry in a parish register was received. The entry was not of the receipt of money, but it was considered as abridging the vicar's rights, being a statement of moduses due. *Lord Arundel's case*, 12 Vin. Ab. 255, pl. 3. In *Drake v. Smith*, 5 Pr. 369, receipts of tithe-money signed by a vicar, in an entry purporting to be a terrier, contained in a book kept in the parish chest. The evidence appears to have been admitted principally on the ground of the credit due to public books. *Vide infra*, part 2.

(3) There is no legal privity of interest; but in point of fact, commonly a strong leaning in favor of the rights of the church, and often a disposition to state those



General observations have been occasionally used respecting the receipt of rectors' or vicars' books, which might be supposed to authorize the admission of any kind of statement contained in them. But such books are not admissible, except where the entries contain receipts of money or ecclesiastical dues, or are otherwise apparently prejudicial to the interests of the makers, in the manner in which entries are so considered in analogous cases.

rights most favorably for themselves (as indeed may be said of all declarants) in their own books, which they cannot themselves use, but which by accident might be used against them. It is rare, for example, to find a payment set down as for a modus, in the books of incumbents. In *Parsons v. Bellamy*, 4 Pr. 190, the Chief Baron says, "as to vicars making evidence for their successors, that is what I cannot listen to. This Court knows they do not do so, and the books of a vicar are as good evidence as the books of a steward." In *Robinson v. Williamson*, 9 Pr. 136, it was said by Baron Wood, that vicar's books which are made by, and remain in the power of the party himself, are liable to a suspicion, which cannot attach to receipts, which are made by the person against whom they are to be used. Although there be no privity between an incumbent and his successor, yet they stand *in pari jure*; and in the case of admissions and judgments, which are only evidence against parties and privies, successive incumbents are, as far as concerns the admissibility of the evidence (though not for the purpose of estoppel) regarded as privies, *vide infra*, part 2. See by Tindal, Ch. J., in *Maddison v. Nuttal*, 6 Bing. 226. The admission, however, of the books of rectors and vicars has been thought an anomaly in the law of evidence, and various grounds have been assigned for it,—such, as the peculiar nature of tithes, the protection due to the clergy, and the *cursus scaccarii*.

See by the Master of the Rolls, in *Short v. Lee*, 2 Jac. & Walk. 464. By Lord Kenyon, in *Outram v. Morewood*, 5 T. R. 123. By Baron Wood, in *Perigal v. Nicholson*, Wightw. 63. By Price, B., in *Woodnorth v. Lord Cobham*, 2 Gwill. 653. By King, C. J., Vin. Ab. Ev. T. b. 73. By Lord Hardwicke, 2 Ves. 43, the first trial in the case of *Le Gros v. Levemore*, Gw. 59. 1 E. & Y. 521. Lord Ellenborough, in *Roe v. Rawlins*, 7 East, 290, puts the admissibility of vicar's books simply on the ground of absence of interest. In *Short v. Lee*, 2 Jac. & W. 464. The Master of the Rolls refers to the analogous decisions respecting prescriptions *in non decimando*, when set up against lay impropriators. In *Glynn v. the Bank of England*, 2 Ves. 43, Lord Hardwicke, after observing that the decisions in the case of rector's books went a great way, lays down a very broad principle for their admission, "That the person making these entries, must know, that they cannot benefit himself, or his property, his representatives having nothing to do with the living, but his successor, who stands indifferent to him, and therefore, that it is not to be presumed that false entries would be made by him for his successor." But it would seem, at least according to the doctrine of the Courts in analogous cases, that the circumstance of the declaration being *against* interest, was essential to guarantee its accuracy, if not its fidelity.

The entry of a deceased lessee of an impropriate rectory, whose interest had expired, has been held to be receivable in evidence. (1) And it is obvious, that the entries of collectors of tithes stand upon the same footing as those of other receivers and bailiffs. (2)

Impropriator's  
books.

According to some authorities, though not of very great weight, the doctrine, according to which entries in rectors' or vicars' books have been held to be admissible in evidence, has been extended, by a supposed analogy, to the case of the books of a lay impropriator. (3) The analogy, however, entirely fails, so far as the doctrine in question may be considered as depending on the circumstance, that the entries are against interest; inasmuch as they are available for the representatives of the party making them. (4) In the case of *Short v. Lee*, (5) the Master of the Rolls was of opinion, that entries in the books of an ecclesiastical corporation entitled to a rectory were admissible evidence for the corporation in suits for tithes brought by them.

(1) *Illingworth v. Leigh*, Gwill. 1615. 3 E. & Y. 1385. Apparently on the same principle as that according to which rectors' books are received, namely, that he had no privity of interest with any succeeding tenant, and the entry could not have been used for himself or his assignee. This doctrine, however, introduces a new qualification of the rule, *viz.* that the entry would not be evidence for the assignee or representatives of the tenant, after his death and during the continuance of his term. It does not satisfactorily appear, that the privity between the tenant and his lessor ought to have been disregarded in this case; there was at least, a temptation for connivance between them.

(2) *Jones v. Waller*, Gwill. 847. *Short v. Lee*, 2 Jac. & W. 490. *Woodnooth v. Lord Cobham*, Bunb. 180. The receiver of a lay impropriator. *Bullen v. Mitchell*, 2 Pr. 399, accounts of the reeve of

an abbey. *Morgan v. Tyler*, cited in *Short v. Lee*, 2 Jac. & W. 464, accounts of bailiffs of New College, Oxford. *Finch v. Messing*, cited *ibid.*

(3) *Anon.* Bunb. 46, a demand for mortuaries. *Anon.* Vin. Abr. Bv. T. b. 73, T. b. 117, see observations on these cases by the Master of the Rolls in *Short v. Lee*, 2 Jac. & W. 464. It has been suggested, *ib.* that the cases in *Bunbury* and *Viner* relate to the same suit, *viz.* the case in *Bunb.* is the report of the trial at  *nisi prius*, and the case in *Viner* is a note of the hearing in the Exchequer.

(4) They fall precisely within the rule laid down in *Outram v. Morewood*, *supra*, p. 320.

(5) 2 Jac. & W. 464. The Master of the Rolls expressed himself strongly in favor of another ground, which was sufficient for the admission of the evidence, *vide supra*, p. 321.

In the cases which have been decided, it will have been noticed, that the declarations have in most instances consisted of memoranda or entries; but from several of the examples it may be collected, that verbal declarations are admissible, though unaccompanied by any writing or by any act done. (1) Where, indeed, declarations against interest accompany acts, they are frequently admissible without reference to the circumstance of their being contrary to interest. (2)

Verbal declarations.

It is a question of considerable importance, how far declarations against interest are receivable in respect of matters forming a part of the declarations, but not in themselves affecting the interest of the declarant. Where declarations of deceased persons acknowledging the receipt of money have been admitted, it appears that they have often been admitted as evidence, not merely of the fact of the deceased having received the money, but also of the circumstances stated as the occasion of the payment. (3) In *Warren v. Greenville*, (4)

Parts of entry not affecting interest.

(1) See the cases collected in the note to *Barker v. Ray*, 2 Russ. 67. *Doe v. Williams*, Cowp. 621. *Holloway v. Raikes*, 2 T. R. 55. *Ivat v. Finch*, 1 Taunt. 141. *Doe v. Jones*, 1 Camp. 367. *Doe v. Pettet*, 5 Barn. & Ald. 220. *Davies v. Pierce*, 2 T. R. 53. *Strode v. Winchester*, 1 Dick. 397. Verbal declarations may, however, be thought of inferior weight to those written, as being more carelessly made, and being often unfaithfully reported; they are besides more seldom connected with any course of business.

(2) *Stanley v. White*, 14 East, 339, where the declarations accompanied acts of forbearance. The declarations in *Davies v. Pierce*, 2 T. R. 53, *supra*, p. 316, might appear to be admissible as part of the *res gesta*.

(3) See the cases collected in the note to *Barker v. Ray*, 2 Russ. 67.

(4) 2 Str. 1129. Independent of the credit due to the collateral statement, there was a presumption that the surrender must have been made before the money was paid. See observations on this case by Lord

Ellenborough, in *Higham v. Ridgway*, 10 East, 117. In *Doe v. Robson*, 15 East, 32, on a question whether a lease had really been granted in possession, and not in reversion, entry of charges in an attorney's book, shewing the time, when a certain lease was prepared, and which charges were shewn (as it would seem by the same book) to have been paid, were held to be evidence after the attorney's death, that the lease was prepared subsequently to the time when it bore date, and at a period when it would have been a lease in possession. It has been observed, that in such cases of entries in the books of deceased attorneys, the entries do not deserve much additional credit from the circumstances of the fact of payment being added. For it would not be probable, that fictitious instructions would, without an assignable motive be inserted in the attorney's book; or if such a motive existed, the adding of the fact of payment would not remove the suspicion attached to the entry. In *Shipwith v. Shirley*, 11 Ves. 65, where an attorney's book was

upon a question whether a surrender to a recovery could be presumed, the book of a deceased attorney was produced, which contained a charge of a sum for suffering a recovery, two items of which related to the drawing of a surrender, and it appeared by the book that the bill was paid. The Court held that the entries were admissible evidence, and material upon the inquiry into the reasonableness of presuming a surrender. In *Barry v. Bebbington*, before cited, (1) upon a question of the soil and freehold of the defendant, entries by a deceased steward of a person, under whom the plaintiff claimed, acknowledging the receipt of monies on account of trespasses committed on the place in dispute, were held to be admissible evidence to disprove the defendant's title, and to establish that of the plaintiff. In *Higham v. Ridgway*, (2) upon a question respecting the age of a person suffering a recovery, an entry made by a deceased accoucheur in his book, of having delivered a woman of a child on a certain day, referring to his ledger, in which he had made a charge for his attendance, which was marked as *paid*, was held admissible evidence of the time of the child's birth. And Lord Kenyon, in speaking of the evidence of stewards' books, observes, that "such books may be read, not only to charge the steward with the amount, but to show on behalf of the tenants, that rents have been received, and also to show, in cases where it might become a question, what kind of rents were payable out of particular estates. (3)

adduced along with other evidence in proof of a lost deed, it does not appear that the charges were entered as paid. *Blaikaler v. Crofts*, Comb. 348. 12 Vin. Ab. 85. See observations in the case of *Warren v. Greenville*, by Lord Mansfield, in *Goodtitle v. Duke of Chandos*, 2 Burr. 1071, and remarks of Lord Ellenborough, upon these observations in *Higham v. Ridgway*, 10 East, 117.

(1) 4 T. R. 514. In this case the steward's accounts were in his handwriting, but not signed by him.

(2) 10 East, 109. Lord Ellenborough, said "it was idle that the word *paid* only should be admitted in evidence, without the context which explains to what it refers.

We must, therefore, look to the rest of the entry, to see what the demand was, which he thereby admitted to have discharged. By the reference to the ledger, the entry there is virtually incorporated with, and made a part of the other entry, of which it is explanatory." For other instances, see *Roe v. Rawlins*, 7 East, 291, receipt of rent in account book of tenant for life, to shew the amount of ancient rent. *Doe d. Powell v. Hill*, cited by Taunton, J., in *Chambers v. Bernasconi*, 1 Cr. M. & R. where Richards, B., said that he could not divide the entry into two.

(3) In *Calvert v. Archbishop of Canterbury*, 2 Esp. 646.

The principle of the admissibility of declarations against interest, for the purpose of proving every thing contained in them, was carried still further in the case of *Stead v. Heaton*. (1) In that case, which respected the existence of a customary payment for the reparation of a parish church, churchwardens' accounts were produced, in which were the following entries,—  
 “Received of Haworth, who this year disputed this our ancient custom, but after we had sued him, paid it accordingly, 8*l*. and 1*l*. costs;” And, at the head of the same page was written, “It is an ancient custom thus to proportion church-lay: 1st. The chapelry of Haworth pay one-fifth, Bradford a third of the remainder, and the rest to be legally divided according to the churchwardens of the several other townships in the parish.” The Court were of opinion, that the entry of payment was clearly admissible, because the officers thereby charged themselves with the receipt; and that the other entry was admissible, because immediately referred to, and that both of them, being written on the same page and on the same subject, must be taken into consideration together; that they were both parts of one and the same transaction, each explaining the other.

In the case of *Marks v. Lahee*, (2) an entry of tender and refusal of money, made by a deceased clerk of an attorney, in a day-book kept for the purpose of entering his daily transactions, was held to be admissible evidence to prove the tender; its admissibility was rested on the ground that it was evidence, that the clerk had received the money and had not disposed of it according to his instructions, so that it rendered him subject to a pecuniary demand.

But it may be thought that there is a distinction between cases, where the admission against interest is part of one entire transaction with the rest of the declaration, (as in the instance of stewards' entries, where the entry might mean nothing unless the whole of it were read,) and cases where declarations embrace

Collateral matters.

(1) 4 T. R. 669. Further concerning entries in churchwardens' books, *Cook v. Bankes*, 2 C. & P.

p. 481, *supra*, p. 259.

(2) 3 Bing. N. C. 408.

matters perfectly collateral. (1) This point was discussed in the case of *Chambers v. Bernasconi*, (2) where one of the questions was, whether the certificate of a capture by a sheriff's officer, stating the place of arrest, was evidence that the plaintiff had been arrested at the place stated. Mr. Baron Bayley expressed an opinion, that supposing the certificate was admissible for any purpose (as being a declaration against interest, or rather as made in the course of official duty), it was not admissible to prove the place of arrest. (3)

In the case of *Rudd v. Wright*, (4) a survey was tendered

(1) See the argument of counsel in *Chambers v. Bernasconi*, 1 Cr. & J. 456, who explain the use of the evidence in the above cases for other purposes, than those for which the entry was originally made, on the ground that the statements received were part of the *res gesta*, with the payment or other matter against interest. It may often however, happen that an entire statement must be read, though the jury be directed not to consider part of it as evidence of the facts related. *Willis v. Bernard*, 8 Bing. 376. *Manning v. Clement*, 7 Bing. 362. And the cases of confessions of prisoners put by Park, J., 8 Bing. 384. *Salte v. Thomas*, 3 Bos. & Pul. 188, where a prison-book was held admissible to prove the period of commitment and discharge of the prisoner, but not the cause of the commitment.

(2) 1 Cr. & J. 456, *vide infra*, p. 343.

(3) Mr. Baron Bayley seems to have treated the question as being clear, that the declaration was not against interest, and he considered that it appeared from the facts of the case, that it was not a necessary part of the officer's duty to state the particular place of arrest. The case involved two other questions besides that noticed in the text; *viz.* whether the declaration was against interest; and whether it was receivable at all, as being made in the course of official

duty. The Court of Exchequer thought the admissibility of the evidence a question of so much importance, that they wished the parties to have an opportunity of putting it on the record. And see the decision on the same case in the Court of Error, *infra*, p. 344.

(4) Before Lord Lyndhurst, Exch. 11 July, 1832. The marginal note stated that the closes, which had been specified as titheable to the vicar, formed part of a certain close mentioned in the terriers; and if so, they broke in upon the entirety of a district, for which the modus was claimed. It is to be observed, that although the interests of the rector and vicar were opposed to each other, yet the college having the patronage of the vicarage, it was to their interest that whatever tithes were clearly payable to the vicar and not to them, should be payable in kind and not by a modus. And if it was clear by other evidence, that they had no right to the tithes of a particular close in any shape, they would not be prejudicing, but promoting their interest, by admitting this acknowledged fact, and inserting as part of the same entry a declaration tending to shew that the tithes were payable in kind. In this case also, it would have been very questionable whether an entry on the part of a corporation could be received in evidence against strangers, on the ground of its being against interest. The case of *Short v. Lee*, *supra*, p.

in evidence, which had been made for the use of Trinity College Cambridge, who were impropiators of a living of which the plaintiff was vicar, and in this survey certain closes were stated as being titheable to the vicar. Lord Lyndhurst observed, that although this document would be evidence against the college in a suit between them and the vicar, it would admit of some consideration, whether it was admissible in evidence against a third person; but that it was unnecessary to decide that question, because the object of producing the survey in evidence arose out of a marginal note to the survey. His Lordship thought that the marginal note could not be received in evidence, inasmuch as it was in the nature of a collateral and incidental observation made by the person who framed the survey; and that it did not follow, because a document is received in evidence in which there are entries against the interest of a party, that therefore collateral and independent matter, which is not a necessary part of such entries, ought to be received. The case of *Stead v. Heaton*, (1) his Lordship observed, did not by any means go to that extent.

In order to render declarations against interest available, it is not essential that the deceased person, who made the entries, should have been a competent witness whilst living, to prove the facts contained in the declaration. (2) This has been ex-

Maker of entry  
not competent.

321, is no authority for this position, as the person whose interest was affected by the entry was deceased. The death of the person making the survey had nothing to do with the question of its admissibility in the present case. It was not argued that the evidence was against his interest, or was admissible on the ground of reputation. The evidence was rejected by Littledale, J., at the trial.

(1) *Supra*, p. 327.

(2) Though such a qualification of the rule is stated by Mr. Justice Bayley, in *Higham v. Ridgway*, 10 East, 109, yet none of the other Judges advert to it. And Mr. Justice Bayley lays down the rule in more unqualified terms, in *Doe v. Robson*, 15 East. See the observations of the Master of the Rolls,

as to the observations of Mr. Justice Bayley, in *Short v. Lee*, 2 Jac. & W. 464. See an argument relative to this point in *Barker v. Ray*, 2 Russ. 71. In *Warren v. Greenville*, 2 Str. 1129, *supra*, p. 325, it was said by the Court, as a reason for receiving an attorney's books, that he might have been examined if living, and his books were, after his decease, the best evidence. In *Gleadon v. Atkin*, 1 Cr. & M. 420. Bayley, B., repudiates the doctrine, that declarations cannot be received, except where the declarant might have been examined in his life-time, and refers to *Middleton v. Melton*, 10 B. & C. 326. *Doe v. Robson*, 15 East, 32. *Bosworth v. Cotchett*, *infra*, p. 348, as shewing that no such qualification exists.

pressly ruled in the case of *Short v. Lee*, where the entries of a deceased member of an ecclesiastical corporation were admitted on behalf of that corporation in a suit brought by them for tithes. (1)

Entry admitted,  
other living tes-  
timony.

The declaration of deceased persons against their own interest are not the less admissible in evidence, because the facts, to which the declarations relate, may be proved by evidence of another kind, as, for instance, by a living witness. This rule may be founded, partly on the great credit due to declarations against interest, and partly in the inconvenience of proving, in every case, the failure of other evidence. (2) It was held, in *Middleton v. Melton*, (3) that the entry made by a deceased collector was proof of the fact of the money having been paid, without calling the persons who paid it, or showing that they were dead. And it appears from the facts of earlier cases, that the same understanding of the Courts as to this point is to be implied from them, (4)

Proof of decla-  
rant's situation.

In order to make entries against interest evidence, it has been held in some cases to be necessary to show, by testimony *dehors* the entries, that the person making the entry was in the situation, in which he purports to be. The character of the evidence, it has been said, must be established, before the entry is read. (5) Thus, in the case of *De Rutzen v. Farr*, (6) it was held, that accounts of rent, signed by a person styling himself

(1) 2 Jac. & W. 464. The rule is there laid down in general terms. In that case the declarant would have been incompetent, on the ground of being a party to the suit, to have been examined in favour of the corporation. But he might have been examined, if he had raised no objection against the corporation to prove the fact for which his entry was used, *vis.* payment.

(2) It will be seen, *infra*, that the admission of the evidence does not impugn the principles on which secondary evidence of facts is excluded.

(3) 10 Barn. & Cress. 317, and *vide infra*, p. 340. *Poole v. Dicus*,

(4) See observations of Parke, J.,

in *Middleton v. Melton*, 10 Barn. & Cress. 328. In the case of *Barry v. Bebbington*, 4 T. R. 514, which was tried in 1791, one of the memoranda was a receipt of a sum of money in 1785.

(5) See per Lord Lyndhurst, and Bayley, B., in *Davies v. Morgan*, 1 Cr. & J. 590. It does not appear in that case whether the entries purported to be made by corporators or by strangers.

(6) 4 Ad. & E. 53. The accounts were found among the family muniments, which might seem to afford a reasonable presumption of their being genuine. And see *Short v. Lee*, 2 Jac. & W. 464, 467.



clerk to a steward, but not shown to have been employed by such steward, otherwise than by the accounts themselves, were not evidence to prove that the rent has been received.

Where the entries are produced in evidence, as being those of receivers of private individuals, it has been ruled, that it should appear by evidence *aliunde*, that the persons making the entries filled that character at the time when the entries were made. Thus, in the case of *Short v. Lee*, (1) where the accounts of a tithe collector were produced in evidence, it was held to be necessary to prove *aliunde*, that the person whose book was produced was authorized to collect the tithes. (2)

But in the same case, account-books in the possession of a corporation, entitled to an impropriate rectory, purporting to be accounts of their collector of tithes, were received, without proof *aliunde*, that the accounting party was really the collector; on the ground, that, by the charter of the corporation, it was their duty to appoint proctors to receive the tithes, and a corporation could have received the tithes themselves. The point was said to be not dissimilar to that decided in regard to collectors of incumbents in general, they being persons whose character depends on the pleasure of a private individual, who might or might not appoint.

It seems, that the situation of the declarant may sometimes be established by the internal evidence of the books containing his entries. In *Doë v. Lord George Thynne*, (3) upon a ques-

(1) 2 Jac. & W. 464. *Manby v. Curtis*, 1 Pr. 225, where proof of agency was required in the case of a receipt for tithes fifty years old.

(2) It is to be observed, that it would be very difficult to prove the appointment of reeves or bailiffs, whose accounts are of great antiquity, and they have certainly in practice been often admitted without such proof, when produced from the proper custody. The internal evidence in such cases leaves no reasonable ground for doubt. The handwriting of a deceased steward, need not be proved after thirty years, *vide infra*. *Wynne*

*v. Tyrwhit*, 4 B. & A. 376. *Jones v. Waller*, Gwill. 847. 2 E. & Y. 141. See *Manby v. Curtis*, 1 Pr. 225, *contra*. The accounts in *Short v. Leigh*, were of the dates 1752, 1753, 1754, and the cause was heard in 1821. See *Jones v. Carrington*, 3 E. & Y. 1131, proof of tithe receipts by a lessee, without producing the lease. *Yates v. Leigh*, Gwill. 861. 2 E. & Y. 151, where receipts purporting to be signed by a receiver, but appearing to have been in fact signed by his deputy, were rejected.

(3) 10 East, 208. It would seem that the similitude between the an-

tion whether certain ancient books, which were produced from the archives of the Dean and Chapter of Exeter, were the books of receivers debiting themselves with the receipt of money, and on that account admissible in evidence, it was held, that the similitude which the entries bore to the books of receivers of the same body in modern times, was not a safe and adequate ground for presuming that the ancient books were kept by persons of the same character and description, and accounted upon as such. But, on it's appearing that some of the entries in the ancient books (not relating to the matter in question) imported that one A. B. was therein accounting to the dean and chapter for money paid to himself, with the receipt of which he therein debited himself in such forms as *solvit mihi, solvit per me*, the Court thought that this was strong internal evidence, that the books were actually receivers' books.

## SECTION II.

### *Declarations and Entries made in the course of Duty or Employment.*

According to the observations of several Judges on different occasions, it might seem that where there was a competency of knowledge, or at least peculiar means of knowledge in an individual making a declaration, and a total absence of interest to pervert the facts to which he has spoken, his declarations would be admissible evidence after his death, even though the declarations did not operate against his interest. (1) But these

cient and modern books was a safe and adequate mode of inferring the nature of the former. That it is sufficient if the entries are signed by a deceased agent, without their being in his handwriting, see *Doe v. Stacey*, 6 C. & P. 139.

(1) See statement by Bayley, B., of the principle of the case of *Roe v. Rawlins*, in *Gleason v. Atkin*, 1 Cr. & M. 420. The declaration of

a person having peculiar means of knowing a fact, and no interest in misrepresenting it, is admissible to prove the fact, *a fortiori*, if it were against his interest, by Lord Ellenborough, in speaking of vicars' books, in *Roe v. Rawlins*, 7 East, 290. By Lord Ellenborough, in *Doe v. Robson*, 15 East, 34. But see by Bayley, J., *ibid.*, and when speaking of that case in 1 Cr. & J.

observations are too loose, and perhaps too contradictory to the principle of the cases which have been just considered, to be regarded as establishing any rule less rigid than that above laid down, which requires the declaration to be against the interest of the person making it, before it can be received in evidence.

There appears, however, more reason for considering that a rule exists, which allows of declarations of deceased persons being received in evidence, even though not made against their interest, provided that in addition to a peculiar knowledge of the facts, and the absence of all interest to pervert them, the declarations appear also to have been made in the ordinary course of official, professional, or other business or duty, and been immediately connected with the transacting or discharging of it, and contemporaneous, or nearly so, with the transaction to which they relate. (1)

General rule.

It appears to be a legitimate ground for admitting such declarations in evidence, that it would be contrary to the experience of mankind, if, in the generality of instances at least, they were not exempt from the suspicion of fraud or carelessness. By the conditions on which such evidence is proposed, it is assumed that no temptation to deceive can be suggested; and it is no unimportant guarantee against fraud, that the declarations cannot be available for the author of them during his life-time. By requiring that the declarations should have been made in the course of ordinary business, and not only connected with the transactions to which they relate, but also contem-

Principle of admission.

458. By *Le Blanc*, in *Higham v. Ridgway*, 10 East. (But subsequent authorities have treated the case of *Higham v. Ridgway* as decided, on the ground of interest.) By *Littledale and Park, J.*, 10 Barn. & Cress. 326, 327. By *Lord Lyndhurst, C. B.*, *Bayley, B.*, 1 Cr. & J. 456, 457. By *Bayley, B.*, in *Glen- don v. Atkin*, 1 Cr. & M. 420.

(1) In speaking of the cases upon this subject, it has been frequently

said that they have gone far enough or too far, and that the principle of them ought not to be extended, see per *Tindal, Ch. J.*, in *Marks v. Lahee*, 3 Bing. N. C. 418. Per *Littledale, J.*, in *Doe v. Vowles*, 1 M. & Ro. 262. Per *Bolland, B.*, in *Chambers v. Bernasconi*, 1 Cr. & J. p. 456. These observations have apparently been intended to include several of the cases stated in the last section.

poraneous with them, a reasonable ground is laid for presuming that they are accurate.

Another ground for the admissibility of such evidence is, that the weight attached to it is not founded merely on the presumption of the credit due, under the circumstances, to the authors of the declarations, but also on the presumption, that in the ordinary course of business such declarations would have been made, if the principal fact to be proved had really taken place. The case is analogous to that in which, it has been seen, declarations are received as evidence of co-existing motives and feelings, (1)—only it is not necessary, that the same intimate connection should exist between the thing proved, and the evidence of it; nor is the thing to be proved of a nature of a secret. It is enough, if the fact and the declaration are ordinarily and usually connected with each other. (2)

It may also be worthy of remark, that as the transactions of business are frequently confined to the knowledge of a few persons, there is some reason, on the ground of necessity, arising out of the subject matter of the declarations, which may be thought to warrant, under proper safeguards, some relaxation of the strict rules of evidence. (3)

It is to be observed, however, that there are authorities, which deny the existence of the rule now under consideration, as distinguished from that which requires it to be shewn, that declarations of deceased persons, to be admissible in evidence, were made against interest. (4) And, doubtless, many of the cases

(1) *Vide supra*, p. 200, *et seq.*

(2) See by Parke, J., in *Doe v. Turford*, 3 Barn. & Ad. 896, who appears to treat this as the true principle of the rule, *vide infra*, p. 336.

(3) It has been seen that similar, though more cogent reasons of necessity, are the foundation of the admissibility of hearsay in the cases of pedigree and matters of general

interest, and also, in some measure, of dying declarations.

(4) In *Calvert v. Archbishop of Canterbury*, 2 Esp. 646. Lord Kenyon, says, "The cases in which an entry made by a servant, in the books of his master, have been received in evidence, are where, by such entry, the servant charges himself and discharges another person." And in the action against

which have been before enumerated, as decided on the ground that the declarations received in evidence were adverse to the interest of the makers of them, might and probably would have been decided on the more general principle, (namely, that the declarations were made in the course of business,) if the Courts had felt no hesitation in recognising such a principle.

The rule, now under consideration, must be admitted to have been principally founded on authorities of an early date, when much precision is not to be found in the decisions of our Courts on the subject of evidence. (1) But a recent decision by the Court of King's Bench, appears to have established it on a surer footing. (2)

the Archbishop, Lord Kenyon rejected the evidence of an agreement entered in the plaintiff's book by a deceased clerk, stating a contract for the hire of horses. It is observed of this case, however, that it did not appear whether, from the course of business or otherwise, it was to be assumed that the agreement was made by the servant himself, or only taken down from his master's hearsay. In *Sikes v. Marshall*, 2 Esp. 705, Lord Kenyon rejected entries of payments in the handwriting of a deceased clerk. In *Chambers v. Bernasconi*, 1 Cr. & J. 451. 1 Tyr. 335. *Infra*, p. 344. The Court of Exchequer appear to have thought, and Mr. Baron Bayley expressly states his opinion, that a certificate of a sheriff's officer of the fact of a caption, which he was required to make by the course of his office, was not admissible evidence, because not against his interest, it amounting to a declaration that the officer had done his duty. In the decision upon the case of *Chambers v. Bernasconi*, in error, 1 Cr. M. & R. 366, the Court speak doubtfully as to the certificate being evidence of the caption, as being an entry in the course of duty. In *Barker v. Ray*, 2 Russ. 76, Lord Eldon intimated an opinion that declarations would not be receivable in cases where the in-

terest of the declarants was not concerned. In *Cook v. Banks*, 2 C. & P. 478, Lord Tenterden appears to have ruled several points, on the supposition that entries of particular facts could only be evidence when against interest.

(1) In the reports of Lord Raymond, Salkeld and Strange, from which a great part of the law upon this subject is derived, the rulings are to be read with much caution, as the law of evidence according to which the determinations of the Courts are at present governed, has been almost entirely created since the time of those reporters.

(2) *Doe d. Pattershall v. Turford*, 3 Barn. & Ad. 896, *vide infra*, p. 339. It is there said by Mr. Justice Taunton, that though most of the prior authorities in support of the rule were *Nisi Prius* decisions, yet that *Evans v. Lake*, *infra*, p. 338. B. N. P. 282, was a trial at bar. Mr. Justice Taunton, however, left the rule somewhat indefinite, for besides requiring that the declaration should be made by a deceased person, in the ordinary course of business, and at the time when the fact it records took place, says, it is necessary that it should be corroborated by other circumstances, rendering it probable that the fact occurred. The previous authorities were, however, relied

In *Doe d. Patteshall v. Turford*, Parke, J., recognises the terms of the rule, for the admission of an entry, not against interest, to be applicable to a case, "where the entry is one of a chain or combination of facts, and the proof of one raises a presumption that another has taken place: that, where an entry is against interest, proof of the handwriting of the party and his death is enough to authorize the reception; at whatever time it was made it is admissible; but in order to make entries in the course of business admissible, it is essential to prove that they were made at the time they purport to bear date; they must be contemporaneous entries." He observes further, "that a necessary and invariable connection of facts is not required; it is enough if one fact is ordinarily and usually connected with the other." And Mr. Justice Taunton, in the same case observes, "that a minute in writing, made at the time when the fact which it records took place, by a person since deceased, in the ordinary course of his business, when corroborated by other circumstances, which must be proved, is admissible in evidence." (1)

In *Poole v. Dicas*, (2) the same principles were recognised by the Court of Common Pleas. And it was held, that an entry made at the time of a transaction, in the usual course and routine of business, by a person who had no interest to mistake what had occurred, was receivable.

In the case of *Price v. Lord Torrington*, (3) the plaintiff,

on, in some of which the probability of the facts having occurred or not, independently of the entries, appears to have been equal.

(1) 3 Barn. & Ad. 890. It was said that this was the ground upon which the cases of *Lord Torrington*, *Pitt v. Fairclough*, *Hagedorn v. Reed*, *Champneys v. Peck*, *Pitman v. Maddox* and others of the same nature had been decided.

(2) 1 Bing. N. C. 652.

(3) 1 Salk. 285. 2 Lord Raym. 873. Holt, 300, S. C. B. N. P. 282. The report says, "Otherwise of the shop-book singly, without more." It may be observed, on

this case, that supposing the drayman had not delivered the beer according to his orders, it is true that his signature to the entry would not have been admissible evidence for him, yet he might very probably have signed the entry in order to prevent immediate detection; or to avoid his being precluded from insisting that he had delivered the beer. He charges, indeed, himself with having received the beer; but it is easy to believe that he would have experienced at least equal difficulty in denying the receipt of the beer, as in denying the delivery of it, sup-

who was a brewer, brought an action against Lord Torrington for beer sold and delivered; and the evidence given to charge the defendant was, that, according to the usual course of the plaintiff's dealing, the draymen came every night to the clerk of the brewhouse, and gave him an account of the beer they had delivered out, which he set down in a book kept for that purpose, to which the draymen signed their names, and the drayman whose name appeared to be signed to an entry, stating the delivery of the beer in question, was dead. It was ruled, that this was good evidence of a delivery.

In *Pitman v. Maddox*, (1) in an action on a tradesman's bill, a shop-book was admitted by Chief Justice Holt, as evidence, to prove the delivery of goods, it being proved that the servant who kept the book was dead, that the entries were in his handwriting, and that he was accustomed to make the entries.

In the case of *Smartle v. Williams*, where the question was, whether mortgage-money had been really paid, the book of accounts of a deceased scrivener was held to be good evidence of payment; (2) in this case it does not appear, that the scrivener charged himself by the entry.

posing it, in fact, received, but not delivered. Supposing him dishonest, he had an interest in denying the receipt, but if there was little doubt of that, it was his interest to state that the goods had been delivered. If he had omitted to state the fact of delivery, it must have led to immediate inquiry. It is observable, that in the case of *Calvert v. Archbishop of Canterbury*, 2 Esp. 645, where this case was cited, Lord Kenyon appears to have considered, that it was decided on the ground that the entry was against interest. In *Sikes v. Marshall*, 2 Esp. 705, Lord Kenyon rejected evidence of payments in the handwriting of a deceased clerk, though, it might be said, that they impliedly admitted the receipt of the mo-

ney paid.

(1) 2 Salk. 690. Lord Raym. 732. S. C. B. N. P. 282. Lord Holt added, that the evidence of delivery was as good as the proof of a witness's hand to an obligation. It may be observed, that if the bookkeeper had not delivered the goods, the absence of an entry of delivery would have been strong evidence against him in an action brought by his employer, and it would have excited an immediate inquiry.

(2) B. N. P. 283. The case appears to be the same as that of *Smart v. Williams*, Comb. 247, of which the following note is given in 12 Vin. Abr. 88. A. b. 15. Scrivener's book to prove a consideration paid (as a tradesman's book) is no evidence for himself, but for any other

In the case of *Evans v. Lake*, upon an issue out of Chancery to try, whether eight parcels of Hudson's Bay stock, bought in the name of Lake, were in trust for Sir Stephen Evans, Sir Stephen Evans' assignees (the plaintiffs) shewed, first, that there was no entry in the books of Lake relating to the transaction: Secondly, six of the receipts were in the hands of Sir Stephen Evans, and there was a reference on the back of them, by a deceased book-keeper of Sir Stephen Evans, to the book marked B. B. belonging to his master. The question, upon a trial at bar, was, whether entries of the payment of the money, contained in the book referred to, should be read. The Court of King's Bench admitted entries from the book in question to be read, as well such as related to the above mentioned six receipts, as also some which related to two other receipts in the possession of the son of Lake. (1)

In *Champneys v. Peck*, (2) upon a question whether an

it is. We have allowed a bursar's book of a college for evidence. Per Holt, Comb. 249, *Smart v. Williams*. In Lord Raym. Rep. 745, *Anon.* the Court say, that the shop-book is not evidence for a tradesman, but it is good evidence against him, or for a stranger. The same law of a scrivener's book for money paid by him, or received to the use of a stranger, or the book of a bursar of a college. 12 Vin. 91, pl. 25. See Lord Lorton v. Gore, 1 Dow. n. 5, where a case submitted to counsel was received as secondary evidence of marriage articles, it appearing that the case had been charged for, and entered as paid, by the family attorney.

(1) *Evans v. Lake*, B. N. P. 282. Lord Hardwicke in *Glynn v. Bank of England*, 2 Ves. 43, says, that this case went a great way, and was a new case. See by Lord Hardwicke in *Lefebure v. Warden*, 2 Ves. 54. It is referred to by Taunton, J., in *Doe v. Turford*, *infra*, p. 339, as being a trial at bar, and therefore entitled to great weight.

(2) 1 Stark. C. 404. The cause

was undefended. In *Pritt v. Fairclough*, 3 Camp. 307, Lord Ellenborough, alluding to cases of this description, says, the rules of evidence must expand, according to the exigencies of society. In that case, an entry by a deceased clerk, in a letter-book, professing to be the copy of a letter of the same date, made according to the course of business, was received in evidence. The case also of *Hagedorn v. Reid*, 3 Camp. 379, directly confirms the case in the text. There a memorandum of a deceased clerk, written on a copy of a licence, stating that the original had been sent to a particular person, was held to be evidence of that fact, upon proof of the course of business followed by the clerks in the office. The case of *Digby v. Steadman*, 1 Esp. 327, is sometimes considered as belonging to this class of cases: where, in an action of trover, the plaintiff's shopman, who proved the delivery, was allowed by Lord Kenyon to produce the shop-book, containing an entry of the delivery in the handwriting of his master, but seen by



attorney's bill had been delivered within a month before the commencement of the action, an indorsement upon the bill, in the handwriting of a deceased clerk, was received in evidence. The indorsement was in these terms: "March 4th, 1815, delivered a copy to Mr. Peck." Upon this indorsement being produced, and evidence being given that it was the duty of the particular clerk to deliver the bill, and that such an indorsement was usually made in the common course of business upon the copy kept, Lord Ellenborough ruled, that the indorsement was *prima facie* evidence of the delivery of the bill.

In the case of *Doe d. Pattershall v. Turford*, (1) it was proved to be the usual course of practice in an attorney's office, on serving notices to quit on tenants, to indorse on the duplicates of such notices the fact and the time of the notice. It was held, that, after the attorney's death, an indorsement made by him on the duplicate of a notice, stating the original to have been delivered to a tenant, was evidence of the fact, that the original notice was delivered. It appeared that the entries were contemporaneous, from the circumstance, that, on the particular day when the attorney was supposed to have given the notice to quit, he left home, and on his return in the evening delivered to his partner the duplicate indorsed by him, which was produced at the trial. (2)

himself within a short time after it was made. It would seem, that, in the present day, a question of this kind could only arise, upon a point as to the means by which a witness might refresh his memory. In *Cooper v. Marsden*, 1 Esp. 1, the same notion appears to have prevailed, of entries in banker's books by a clerk produced as a witness, being substantive evidence.

(1) 3 Bar. & Ad. 890.

(2) It appeared that it was not the habit of the attorney to serve notices himself. But it was said, that the attorney must be presumed to do what he required his clerks to do. The probability of

the notice having been delivered, was confirmed by other circumstances which were relied on by the Judges, but (with the exception of Mr. J. Taunton) they do not appear to have expressed an opinion, that those circumstances were essential to the admissibility of the indorsement. This case is approved of in *Poole v. Dicus*, 1 Bing. N. C. 652, though in the argument of *Chambers v. Bernasconi*, 1 Cr. M. & R. p. 367, the Chief Justice intimates that such an entry made by a clerk would favor his interest, asking, [if the clerk had not an interest in saying that he had done his duty.

In *Poole v. Dicas*, (1) it was held, that an entry of a dishonor of a bill of exchange, made in the usual course of business at the time of the dishonor, in the book of a notary by his clerk, who presented the bill, might be given in evidence in an action on the bill, upon proof of the death of the clerk who made the entry. It was observed by the Court, that it was the duty of the notary's clerk to present bills for payment on the evening of the day, when payment was demandable. After going out with the bill for the purpose of presentment, he returns and makes an entry in the margin of the book, in which a copy of the bill had been made upon it's being left at the notary's for the purpose of presentment. This was all in the ordinary course of business. And the clerk had no interest to make a false entry. Again, the book in which the entry was made, was open to all the clerks of the office, so that an entry, if false, would be exposed to speedy discovery. The entry being thus *prima facie* consistent with truth, there were many accompanying circumstances which tended to confirm it's correctness.

Entries received, other available testimony.

It is not essential to the reception of evidence of this description that no other evidence can be given, except that which is offered. Thus it was observed by Tindal, C. J., in *Poole v. Dicas*, (2) that in *Doe v. Turford*, (3) there might have been persons present when the notice was served, and that in the principal case it would operate as a great hardship to require the testimony of the persons who might have been present. The clerk who presented the bill could scarcely, at the distance of two years, point out who it was that answered his application, and if it were necessary to call all the persons who resided at the place of presentment, the expense and inconvenience would be enormous.

(1) 1 Bing. N. C. 652. The circumstance of the entry having been made at the time was considered by the Court to be very material. It is to be observed, that the Court appear to have sought for confirmatory circumstances in corroboration

of the general principle. As to entries by a notary's clerk, see *Sutton v. Gregory*, Peake's Add. Ca. 150.

(2) 1 Bing. N. C. 654, and *vide supra*, declarations against interest.

(3) *Supra*, p. 339.

In all the above examples, it will be observed, the declarations were made with reference to transactions, the knowledge of which would, from the nature of them, usually be confined to a few persons, and the declarants might be said to have had a peculiar acquaintance with the facts to which they spoke; further, the declarations were connected with acts done at or about the time when they were made by the persons making them, so that they might be regarded rather as the ordinary incidents of the transactions to which they relate, than as narratives of them.

The necessity, indeed, of the declarations being contemporaneous, or nearly so, with the transaction to which they relate, appears to be more plainly shewn by some negative examples. Thus, where the plaintiff, in order to prove the delivery of some wine, produced a book which belonged to his cooper, who was dead, but whose name was set to several articles as wine delivered to the defendant, Lord Raymond would not allow the evidence, saying, that it differed from Lord Torrington's case, because there the witness saw the drayman sign the book every night. (1) In *Champneys v. Peck*, (2) mentioned in a former page, Lord Ellenborough was not satisfied with the evidence of the indorsement of a deceased clerk to prove the time of the delivery of an attorney's bill, until it had been shewn by extrinsic evidence, that the indorsement existed at the time, when according to its purport the bill had been delivered. And in the case of *Doe d. Pattershall v. Turford*, (3) it is observed by one of the Judges to the effect, that, in the case of declarations against interest, the time of making the declaration is immaterial, but that with respect to the declarations in question

Contemporaneous entries.

(1) *Clerk v. Bedford*, B. N. P. 282. The reasoning of the Lord Chief Justice supports the doctrine of the admissibility of *contemporary* memoranda in the course of business.

(2) 1 Stark. C. 404, *supra*, p. 338.

In some of the earlier cases this qualification of the rule does not appear to have been strictly attended to. See *Pitman v. Maddox*, and *Smart v. Williams*, *supra*, p. 337.

(3) 3 Barn. & Ad. 898.

it is essential that they should be contemporaneous. (1) In *Poole v. Dicus*, (2) the circumstance of the entry having been made at the time of the transaction was considered very material.

Course of business.

But there appears to have formerly existed some doubt concerning the question, whether declarations, apparently made in connection with transactions of which the declarant has peculiar knowledge, but not in the ordinary course of any business or employment, or which it is not the declarant's ordinary practice or duty to make, were receivable in evidence.

In *Pyke v. Crouch* (3) indeed, on a trial at bar, it was resolved, that if the duplicate of a will be written by the direction of a testator, and be sent by him to a stranger to keep it safely, and the stranger sends back a letter to the testator, in which he makes mention that he has received the will after the death of the stranger, such letter may be read as circumstantial evidence, to prove that such a duplicate of a will was sent by the testator to the stranger.

But it will have been observed, that in most of the above cases, great stress appears to have been laid upon the circumstance, that the entries admitted were such as were customarily

(1) The Judges said, that the entry ought to be proved to have been made at the time that it purported to bear date, and when, in the ordinary course of business, such an entry would be made, if the principal fact to be proved had really taken place. The case of *Searle v. Lord Barrington*, *infra*, p. 346, appears at variance with the rule, that requires proof of an entry being contemporaneous. But it is conceived that if that case can be supported as to this point, it would only be allowed as a precedent for cases where the circumstances were precisely similar.

(2) 1 Bing. N.C. 653.

(3) Lord Raym. 730. It was

before considered, whether the letter could be regarded as part of the *res gestæ*. It would seem that the letter was in a slight degree an admission against interest, as it admitted a bailment. But the evidence appears to have been received simply as a statement made in the course of a transaction, the knowledge of which was confined to a few persons, and as a letter which would most probably have been written if the will had really been sent to the stranger. The answer was probably considered as the natural result of the fact to be proved, and not merely a narrative of it unconnected with the transaction.

made; and this perhaps is to be implied in all the cases already noticed, except that of *Pike v. Crouch*, (1) which was decided at a time before the principle of this class of cases had been much considered.

In the case of *Chambers v. Bernasconi*, (2) on a question whether the plaintiff had committed an act of bankruptcy, the case mainly turned on the place where the plaintiff had been arrested. To prove the place of arrest a certificate was produced, signed by the sheriff's officer who made the arrest, and who was since dead, in the following terms: "9th November, 1825, arrested A. H. Chambers, in South Molton Street, at the suit of William Brereton." (signed) "Thomas Wright." It appeared that the sheriff's officers were always required, immediately after any capture, to give in a certificate of it. This evidence was received, but upon a motion for a new trial, the Court of Exchequer thought the question of the admissibility of the evidence of such importance, that they wished the parties to have an opportunity of putting it on the record. The question of the admissibility of the evidence involved several points which have been before noticed. But in reference to the point under consideration, Mr. Baron Bayley expressed his opinion, that supposing the entry admissible at all, on the ground that it was the duty of the sheriff's officer to make the return; still that the return was not evidence as to the place of arrest; it not being, (at least at the time when the arrest was made) a necessary part of the officer's duty to state the place of arrest. From which it may be, perhaps, inferred to have been the learned Judge's opinion, that if no part of the

(1) See particularly by Lord Holt, in *Pitman v. Maddox*, 2 Salk. 690. *Clerk v. Bedford*, B. N. P. 308. 3 Campb. 308, n. *supra*, p. 341; and by Holt, C. J., in *Smart v. Williams*, Comb. 249. 12 Vin. Ab. A. b. 15. "The book of a man that keeps regular entries might be evidence for him." By Lord Hardwicke, in *Lefebure v. Warden*, 2 Ves. 54, "if there be proof that he was the ser-

vant or agent usually employed in such business, was entrusted to make such entries by his master, and that it was the course of trade."

(2) 1 Cr. & J. 451. 1 Tyr. 335. From the report in *Crompton & Jervis*, p. 452, it appears, that the practice of requiring the officer to make a return of the place of arrest had not been adopted in 1825.

entry had been in the course of official duty, though it had related to a matter transacted at the time, and of which the officer had peculiar knowledge, it must, without question, have been rejected.

In the decision upon the same case in the Court of Error, (1) the Court observed, that the ground upon which the argument was first rested, *viz.*, that the certificate was an admission against the interest of the party making it, because it made him liable for the body arrested, was not much relied on. But recourse was had to a much broader principle, *viz.*, that an entry written by a person deceased in the course of his duty, where he had no interest in stating an untruth, is to be received as evidence of the fact stated in the entry, and of every circumstance therein described, which would naturally accompany the fact itself. Now admitting, for the sake of argument, that the entry tendered was evidence of the fact, and even of the day when the arrest was made (both which facts it might be necessary for the officer to make known to his principal,) still it was not receivable to prove in what particular spot within his bailiwick the capture took place, that circumstance being merely collateral to the duty done. And the Court were of opinion, that whatever effect may be due to an entry made in the course of any office reporting facts necessary to the performance of any duty, the statement of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstances.

Admissible for  
whom.

It would seem, that, in general, declarations of the nature under consideration would not be admissible for parties in privity with the persons making them. (2) For although the

(1) *Chambers v. Bernasconi*, 1 Cr. M. & R. 367. It may be thought, from the report of the case, that the Court appear to have spoken with hesitation concerning the principle of the class of cases under consideration.

(2) In *Lord Raym.* 745. *Anon.* 12 Vin. 91. A. b. 25, Lord Holt

says, that shop-books are not evidence for tradesmen, but good evidence against them, or for a *stranger*; and see 12 Vin. Ab. 88, A. b. 15. Per Holt, Camb. 249, in *Smart v. Williams*. Lord Hardwicke, in *Glynn v. Bank of England*, 2 Ves. 43, adverting to the cases of tradesmen and shop-books, says,

principle, on which such declarations are received, does not depend on the future use of the declaration, still the actual event of it's being made available for persons in privity with the maker, would, it is conceived, in general, be regarded as proof of such an existing motive of interest, as according to the terms of the rule would exclude the evidence. It has been seen, in the case of *Outram v. Morewood*, that entries, admitting a fact adverse to the interest of the person making them, were not allowed to be used for the benefit of persons claiming under the maker. Although no general rule has been laid down by the Courts on the subject, even as regards declarations against interest, and although the admissibility of that species of evidence rests on a different kind of presumption from the evidence under consideration, yet, it is conceived, that, in both instances, the declarations can, in general, only be made use of by strangers in interest.

There are, however, two remarkable decisions respecting indorsements of interest, in which it appears to have been held, that a person's own declarations in the course of business were admissible for a party claiming under him, or succeeding to his representative title, though it did not appear by negative evidence, but that the declarations were made at a time when they might have been made, and when, if made, they would have promoted the interest of the representatives of the maker. It is proper to observe, however, that the indorsements in these cases, have by great au-

Indorsements  
on bond.

there is no instance where entries, in a man's own hand, have been admitted after any length of time as evidence. And see by Lord Hardwicke, in *Lefebure v. Warden*, 2 Ves. 54. In most of the cases relating to written entries, the entries have been made by shopmen or agents, and in *Glynn v. Bank of England*, 2 Ves. 43, Lord Hardwicke doubts whether, in Sir S. Evans's case, *supra*, p. 338, the entries would have been admissible if made by

himself. And see by Lord Hardwicke in *Lefebure v. Warden*, 2 Ves. 54. In *Doe v. Turford*, *supra*, p. 339, 3 Barn. & Adol. 896, the person whose indorsement was admitted, acted as agent. But it would seem that the circumstance of an entry being made by a shopman or agent is not a necessary qualification of the rule by which declarations of the nature in question are admitted.

thorities, been represented simply as declarations against interest.

In an action on a bond, (1) brought by the plaintiff as administratrix of her deceased husband (the obligee) against the defendant as administrator of the obligor, the defendant insisted on the length of time that had elapsed between the date of the bond and the commencement of the action, which was about twenty-seven years, as raising a presumption, that the money had been paid: in answer to this, the plaintiff offered in evidence two indorsements on the bond, (2) in the handwriting of the obligee, one dated in December, 1699, the other in March, 1707, purporting, that the whole of the interest had been paid up to the time of these dates. The Chief Justice Pratt, before whom the action was first tried, rejected the evidence, (3) on account of the inconvenience which would arise from allowing the obligee, in whose custody the bond always remains, to make such indorsements, whenever he might think proper. The plaintiff was accordingly nonsuited. But after an argument in the Court of King's Bench on a case stated for the opinion of that Court, the other three Judges held, (4) that the indorsements in question ought to have been left to the consideration of the jury; "for the jury (as the report in *Strange* states) *might have reason to believe*, that it was

(1) *Searle v. Lord Barrington*, 2 Str. 826. 8 Mod. 279, S. C. 2 Lord Raym. 1370, S. C. 3 Brown, P. C. 535, S. C. 3 P. Wms. 397. 2 Eq. Ca. Ab. 414, n. to Ca. 16. 12 Vin. Ab. p. 85. With reference to this case, the reader is referred to *Glynn v. Bank of England*, 2 Ves. 42. *Turner v. Crisp*, 2 Str. 827. *Rose v. Bryant*, 2 Campb. 323. *Bosworth v. Cotchett*. *Gleadon v. Atkin*, *infra*. The dates will be found to be as follow:—The bond was dated in June, 1697; the obligor died in 1710; the plaintiff's letters of administration were obtained in July, 1723; the first action was tried before Pratt, C. J., in 1724; the second action, before

*Raymond*, C. J., in 1726. The writ of error in the Exchequer Chamber was in 1729; and the judgment of the Exchequer Chamber was affirmed on appeal to the House of Lords in 1730. (See the Reports in *Strange & Brown*.) The time of the obligee's death is not stated in any of the reports; but it appears that administration of his effects was sued out in 1723, which was about twenty-six years after the date of the bond.

(2) See 3 Brown, P. C. 593, and 2 Lord Raym. 1370.

(3) See the Reports in *Strange*, and 8 Mod.

(4) See Report in *Strange*.



done with the privity of the obligor; and the *constant practice* is for the obligee to indorse the payment of interest, and that for the sake of the obligor, who is safer by such an indorsement than by taking a loose receipt." And the report in the 8th Mod. is full and strong to the same effect. "It is the *daily practice* (says that report) to make such indorsements on bonds, and generally at the request of the obligor; and this is the best and surest evidence of the payment of the money, because acquittances and notes may be lost, whereas indorsements will continue as so many brands on the bond, into whose hands soever it falls, as long as the original, which creates the charge, shall continue." The nonsuit was not set aside, because at that time there was a prevailing notion, that as the plaintiff had been put out of Court by the nonsuit, the Court could not order a new trial. The plaintiff afterwards brought a new action, which was tried before Lord Raymond; and the same indorsements were again offered in evidence, to repel the presumption of payment of the principal. The counsel for the defendant objected to the evidence, (1) on the ground, that it did not appear when those indorsements were made, otherwise than by the indorsements themselves. But Lord Raymond was of opinion, that the indorsements were evidence to be left to the consideration of the jury, and therefore allowed them to be read; and, (as one report states) *other circumstantial evidence* being given to induce the jury to believe, that the bond had not been satisfied, (2) the plaintiff had a verdict. The defendant's counsel tendered a bill of exceptions, which was sealed by the Chief Justice; and a writ of error was brought in the Exchequer Chamber. The errors were twice argued in the Exchequer Chamber, and the judgment of the Court of King's Bench was affirmed. (3) A writ of error was then brought in the House of Lords; and after counsel had been heard on this writ of error, and the Judges had delivered their opinions *seriatim*, the House of Lords

(1) See Report in Brown.

(2) See Brown's Report.

(3) According to the Report in Strange, five judges thought the evidence admissible,—two were of the

contrary opinion. The Report in Brown states, that the judgment was affirmed by the opinion of all the judges.

affirmed the judgment of the Exchequer Chamber. The grounds of the decision in the Exchequer Chamber, and in the House of Lords, do not appear in any of the reports. (1)

Indorsements  
on note.

The case of *Searle v. Lord Barrington*, has been followed by that of *Bosworth and Parr v. Cotchett*, determined in the House of Lords. (2) In that case the payee of a promissory note had written indorsements of the half-yearly pay-

(1) Upon the argument in the case of *Bosworth v. Cotchett*, Lord Eldon directed the record in *Searle v. Lord Barrington* to be examined, and it appeared that there was no mention of any circumstances to shew, that the indorsements were made before the presumption of payment could have arisen. The time of the death of the obligee does not appear to have been proved. It appears from a note in Brown's reports, that Mr. B. Comyns was for revising the judgment; and that Lord Raymond, Ch. J., Mr. Justice Eyre, and Mr. Justice Probyn, were absent. The observation of the Court, that the jury might have reason to believe that the indorsement was made with the privity of the obligor, shews the loose ideas on the subject of evidence which prevailed at the period of the decision. In *Glynn v. Bank of England*, 2 Ves. 43, Lord Hardwicke states, that he considers, that in *Searle v. Lord Barrington*, the indorsements were made within the twenty years. Some credit appears to have been given to a presumption that the indorsements were within time, from the fact of their appearing to be so by their date, *vide* by Lord Hardwicke, *ib.*, and *Turner v. Crisp*, 2 Str. 827. But if there had been no date at all, the probability of a person fabricating the entry would not have been stronger than that of a person fabricating a date. Lord Hardwicke, 2 Ves. 43, seems to have considered that the declarations of an individual might be available for his representatives, when they were originally against his interest; and when it is only by the consequential use of them, that his property is benefited.

But this assumes a positive sacrifice of interest to be proved in the first instance, and in the next place an absence of any contemplation of a greater future benefit. Lord Hardwicke, however, lays it down as a fundamental rule, that a man shall not be permitted to make evidence for himself; and on this ground, that a list of bank notes, in the testator's handwriting, was inadmissible for his representatives, to prove the fact of his having been formerly in session of the notes.

(2) Tried at Leicester Sum. Ass. 1819, before Richards, Ch. B. Judgment in the House of Lords, 6th May, 1824. By the stat. 9 Geo. 4, c. 14, it is enacted, that "no indorsement or memorandum of payment, written or made, by or on behalf of the party to whom such payment should be made, shall be deemed sufficient proof of such payment, so as to take the case out of the statute of limitations." In this case and in that of *Searle v. Lord Barrington*, (the principle of which appears to be condemned by the stat. of 9 Geo. 4, c. 14, notwithstanding what is said, in the latter case, respecting the privity of the obligor, the ground of the decisions appears to have been the inference to be drawn from the ordinary course of business. The usual course of business, indeed, proves, that *when* interest is paid, such is the usual way of receipting it, and that is all. In the absence of all evidence to the contrary, an indorsement on a promissory note, admitting the receipt of interest, will be presumed to have been made at the time it bears date, see *Smith v. Battey*, 1 M. & Ro. 341.

ment of interest, from the time of making the note till his death (which happened within six years of the date of the note), and the like indorsements had been written by his executor (who died before the commencement of the action); and it was adjudged, that these indorsements were admissible in evidence, in answer to a plea of the statute of limitations; though there was no extrinsic evidence offered of the time when the indorsements were made, and though more than six years had elapsed between the death of the maker of the note, and that of the executor.

In the case of *Gleadon v. Atkin*, (1) it was held, that an indorsement upon a bond in the handwriting of the obligee, which appeared to have been made at or about the time when the bond was executed, but which was not proved to have been ever seen by the obligor, stating that the bond was given to the obligee in trust for a third person, was admissible in evidence to connect the payments of interest with the bond, the bond being upwards of twenty years old, but interest having been paid within twenty years by the obligor to the third person. The authorities of *Searle v. Lord Barrington* and *Bosworth and Cotchett*, were relied on in the decision of the Court, and Bayley, B., observed, that he had discovered by his own research, that in *Searle v. Lord Barrington*, evidence was given of the time when the indorsements were made, though it is not stated in the reports. The Court appears to have considered these two decisions as well as the case before them to fall within the principle, treated of in the first section of this chapter, that the declarations of a person having peculiar means of knowledge, having no interest to misrepresent and making a declaration against his interest are admissible in evidence after his death.

It has been held, that where indorsements of receipts of part of a bond were proved to have been made after the presumption of payment had taken place, they were inadmissible. (2)

(1) 1 Cr. & M. 410.

(2) *Turner v. Crisp*, 2 Str. 827. The Chief Justice saying, that it differed from the case of *Searle v.*

*Lord Barrington*, where the indorsements appear to have been made before they could be thought necessary to be made use of to en-

## CHAPTER XVII.

## OTHER EXCEPTIONS TO THE RULE WHICH EXCLUDES HEARSAY EVIDENCE.

**A**N exception to the rule excluding hearsay evidence, of great practical importance, exists in the case where particular facts have been inquired into by public authority. Some of the inquiries alluded to have been made by persons on their oaths; some have been made by persons not sworn themselves, but who have received their information upon oath; some have neither of these guarantees for their accuracy.

Analogous to the exception just mentioned, is one which includes numerous instances, where credit is given to statements on account of the authority and peculiar knowledge of the person making them, or of their official and public character.

There are also various statutory exceptions, which relate, in general, to inquiries of public concern, and where due care is taken to provide for the accuracy and fidelity of the statements.

As the evidence, which is the subject of these exceptions, is chiefly of a nature depending on the character of particular documents, the plan of the work requires that the consideration of it should be postponed until the subject of written evidence is treated of. The principal public documents which are used in evidence will be noticed in the second part, and the effect of each will be explained, whether as supplying hearsay evidence receivable in Courts of Justice, or as operating in other ways. It has been impossible to avoid altogether anticipating the subject of public documents in the preceding chapters, particularly as regards the evidence of depositions, verdicts, and other public documents in matters of pedigree and upon ques-

tions of public right, and it has been thought advisable to collect in these chapters the whole of the information respecting the effect of private writings, as far as they regard the doctrines of hearsay evidence.

It remains to notice those exceptions to the rule excluding hearsay evidence, which are founded upon considerations personal to the party who is to be affected by the evidence.

It has been held, that the testimony of a deceased witness, who has been examined upon oath, on the trial of a former action between the same parties, and where the point in issue is the same as in the second action, is admissible on the trial of the second action, and may be proved by one who heard him give evidence. (1) And, where a person, who had been sworn on a former trial between the same parties on the same issue, and subpoenaed to appear as a witness at a second trial, did not appear in obedience to the writ, the Court of King's Bench, seeing reason to believe that he had been kept away by the contrivance of the adverse party, admitted other witnesses to prove what he had sworn on the former occasion. (2)

It has recently been held, that where a witness has been examined in a suit in which A. and others were plaintiffs and B. defendant, his examination, after his decease, may be adduced by B. in an ejectment brought by him against A. alone; for the lessor of the plaintiff is the real party in an ejectment, and A.

(1) *Rex v. Carpenter*, 2 Show. 47. Buckworth's case, Sir T. Raym. 170. Vin. Ab. Evidence (T. b. 88, pl. 4.) *Coker v. Farewell*, 2 P. Wms. 569. *Pike v. Crouch*, 1 Lord Raym. 730. By Lord Kenyon, 4 T. R. 290. *Mayor of Doncaster v. Day*, 3 Taunt. 262. *Strutt v. Bovington*, 5 Esp. 57. 1 Starkie, 211, n. Notwithstanding there is the usual order in equity for reading depositions, *Todd v. Winchelsea*, 3 C. & P. 387. See *Doe d. Lloyd v. Passingham*, 2 C. & P.

440. That the short-handwriter's notes of the evidence of living witnesses is not receivable. *Williams v. Taylor*, 3 M. & P. 350. As to the Judges' notes, see *Crease v. Barret*, 1 Tyr. & Gr. 112. From analogy to the law as to depositions before magistrates, it would seem that the same rule would apply in new trials of indictments removed by *certiorari*.

(2) *Green v. Gaturk*, B. N. P. 243.

had the same power at the former trial of objecting to the competency of the witness, and the same right of cross-examination and of calling witnesses to contradict, or discredit his testimony, as he would have had, if the witness had been alive and subpoenaed on the second trial. It was also held, that the evidence was producible in the cause for the same purpose, and to the same extent, as if the witness had been alive and given his evidence; consequently, that where the witness was one of the attesting witnesses to a will, his evidence at the former trial was sufficient proof of the will, and the evidence of the surviving witness was not better evidence. (1)

It seems that the exception would apply, where the parties to the first trial were represented on the second occasion by persons who had succeeded to them by privity of law, of blood, or of estate, and that the rule upon the subject is in this respect analogous to that which prevails in the case of estoppels by judgment, the admissibility of verdicts, and the effect of admissions. (2)

It has been said, that the person, called to prove what a deceased witness said on the former trial, must undertake to repeat precisely his very words, and not merely to swear to their effect. (3) This, it is conceived, can only mean, at the furthest, that he must be able to speak to the identical words of the former witness, when it is essential that the very identical words should be known. In some cases, proof of the substance of the former evidence may be as satisfactory as proof of the identical words, unless the witness can undertake (what is not possible) to deliver the same words precisely with the same manner and in the same tone. (4)

(1) *Wright v. Doe d. Tatham*, 1 Ad. & Ell. 21.

(2) See *Doe d. Foster v. Earl of Derby*, 1 Ad. & Ell. 790, where the evidence was rejected on the ground that the two trials were not substantially between the same parties. The decisions as to depositions, and as to verdicts and admissions, *infra*.

(3) Lord Palmerston's case, cited by Lord Kenyon, in *Rex v. Joliffe*, 4 T. R. 296. *Ennis v. Donniethorne*, Corn. Sum. Ass. 1789, by Lord Kenyon, citing *Rex v. Deboragh* from one of his own notes.

(4) On an indictment for perjury, it is sufficient if a witness states from recollection, the evidence which the defendant gave, though

The evidence in such case is of a different character from any which has been hitherto considered; for not only is it free from the objections of being extra-judicial, and not taken upon oath, but the party, to be affected by it, had the power of cross-examining the witness, and that under the same circumstances as upon the present trial. Still the jury have not the means of judging of the demeanor of the witness, which is very important for the discovery of truth. That particular safeguard, however, has been relinquished by the legislature, and by the Courts on several occasions, where the requiring of it would be likely to occasion a failure of justice. (1)

The exception, in question, applies to depositions taken in Chancery or before magistrates, (2) and it receives much illustration from the decisions respecting that species of documents. It will, therefore, be further considered in that part of the work, which treats of written evidence.

The last exception which it will be necessary to notice, relates to the admissions of parties in civil suits and the confessions of prisoners. These will be most conveniently treated of in a separate chapter.

he cannot say with certainty, that it was all the evidence the defendant gave, if he can say with certainty that it was all he gave on that point, and that there was nothing to qualify it, *Rex v. Rowley*, 1 M<sup>c</sup>. Cr. Ca. 111, and cases, *ib*.

(1) See *infra*, the statutes relating to the examination of witnesses under commissions before Justices, or otherwise. Also the decisions respecting the reading of deposi-

tions taken before Justices or the coroner.

(2) In one respect depositions are less liable to objection than oral testimony, as a more trustworthy account is obtained of what was actually stated. But, on the other hand, the previous examination is not equally solemn with that for which it is substituted, nor is there the same power of cross-examination.

## CHAPTER XVIII.

## ADMISSIONS AND CONFESSIONS.

THE exceptions, which have been admitted to the rule excluding hearsay evidence, in the instances of admissions and confessions, depend chiefly on the principle of a reasonable presumption in favor of the truth of a statement, when it is against the interest of the person who makes it. And this species of evidence is of a nature, which renders it unnecessary to require that the author of the statement should be called as a witness, even where he is capable of being called, for the purpose of proving it. In many cases to which the exception in regard to admissions is applicable, the evidence is considered as of a conventional nature,—so that if it be not agreeable to truth, it is at least consistent with that state of facts, the truth of which the party making the admission has induced other persons to assume, as the basis of their transactions. There is an *argumentum ad hominem*, which has probably contributed to the reception of this species of evidence, and which may be thought to remove any objections made by a person who contends that his own statements have been founded in mistake or error.

Nevertheless it is obvious, that the evidence, which is the subject of these exceptions, is liable to many of the objections attaching to hearsay evidence in general. Some objections, also, are of a peculiar nature, especially in the instance of confessions. And in the various instances in which persons are liable to be affected by the admissions of others, on the alleged ground of being identified with them, the principles, upon which the exceptions under consideration are founded, lose a considerable part of their effect. Hence, these exceptions are subjected to several restrictions and qualifications,



which it is proposed to treat of, first, as they regard the law of admissions, and, secondly, as they regard that of confessions.

## SECTION I.

*Of Admissions.*

On the subject of admissions it may be laid down as a first principle, that the whole of the statement, which contains the admission, is to be received together. (1) This is necessary, in order to enable the Court to judge of the true meaning and extent of the admission, which will often have a different import, when taken together, from that which a partial account is calculated to convey. (2)

Nature of admission.  
Whole admission.

For example, if a part of an answer in Chancery is read in evidence, the other party is entitled to have the whole read, (3) and if, on exceptions taken, a second answer is put in, the defendant may insist upon having that also read, to explain what he swore in his first answer. (4) If a person, in making an admission against his own interest, refers to a written paper,

(1) See cases collected in note to *Roe v. Ferrars*, 2 B. & P. 548. *Earl of Bath v. Battersea*, 5 Mod. 9. 3 Salk. 153. *Countess of Dartmouth v. Roberts*, 16 East, 334. *Barne v. Whitmore*, Bac. Ab. Ev. 622. B. N. P. 237. Salk. 286. The whole of a recital in a deed must be taken, 2 Ventr. 171. 1 Com. Dig. Ev. b. 5. As to the point whether upon indictments for perjury, it is necessary for the prosecutor to prove the whole of the defendant's testimony, 2 Russ. on Cr. 547. *Rex v. Jones*, Peake, 37. *Rex v. Dowlan*, Peake, 170. *Carr's case*, 1 Sid. 418.

(2) By Lord Tenterden, in the *Queen's case*, 2 Br. & Bing. 287. In *Thompson v. Austin*, 2 D. & R. 361. Lord Tenterden, says, "it is at all times a dangerous thing to admit a portion only of a conversation in evidence, because one part

taken by itself may bear a very different construction, and have a very different tendency to what would be produced if the whole were heard; for one part of a conversation will frequently serve to qualify and to explain the other."

(3) By Holt, C. J., in *Lynch v. Clarke*, 3 Salk. 153. *Earl of Bath v. Battersea*, 5 Mod. 9. Gilb. Ev. 44. It is said that this rule does not hold, when an answer is put in for the purpose of shewing the incompetency of a witness, who has, in his answer, admitted himself interested in the event of the cause. *Sprain v. Drax*, trial at bar, B. N. P. 32. It is conceived that the question must be, in such a case, whether the rest of the answer might be relevant to explain the admission contained in it.

(4) *Rex v. Carr*, 1 Sid. 418. B. N. P. 237. Gilb. Ev. 50.

without which the admission is not complete, the contents of the paper ought to be shewn, before the statement can be used as evidence against the party. (1) And if part of a conversation is used as evidence by way of admission, the party, against whom it is used, is entitled to have the whole conversation repeated. (2) Where commissioners in bankruptcy send for a party, and compel him to produce documents and answer questions, secondary evidence cannot be given of the documents without proof of the examination which accompanied their production. (3)

It is proposed to consider whether any limits have been imposed on the reception of hearsay evidence of a party in his own favor, upon the ground of its accompanying an admission.

In the Queen's case, the Judges appear to have considered, that there was no other limit to the admissibility of the whole of the statements containing an admission, than that of relevancy to the suit. Lord Tenterden, in delivering the opinion of the Judges, says, "if a counsel chooses to ask a witness as to any thing which may have been said by an adverse party, the counsel for that party has a right to lay before the Court

(1) See *Jacob v. Lindsay*, 1 East, 462. *Smith v. Young*, 1 Campb. 439. *Lord Barrymore v. Taylor*, 1 Esp. 325. *Collet v. Lord Keith*, 4 Esp. 212. *Randle v. Blackburn*, 5 Taunt. 245. *Boardman v. Jackson*, 2 Ball & Bea. 386. *Falconer v. Hanson*, 1 Campb. 171, where a log-book was referred to in a deposition. *Dagleish v. Dodd*, 5 C. & P. 238, where a letter, written by the defendant, was put in, and it was held, that the defendant had a right to have read what was written on the back by the plaintiff. But where a plaintiff put in evidence the copy of a writ, it was held that the defendant had no right to have the sheriff's return read, which formed no part of the document in evidence. *Adey v. Bridges*, 2 St. 189. *Johnson v. Gilson*, 4 Esp. 21, where a letter produced refers to other letters; *secus*, if the letter merely states that others are enclosed under its cover.

*Wheeler v. Atkins*, 5 Esp. 246, interrogatory referring to a letter. So that, if the interrogating party refuse to produce the letter, he must abandon the whole of the interrogatories.

(2) *Smith v. Blandy*, R. & M. 257. *Smith v. Young*, 1 Campb. 439. *Green v. Dunn*, 3 Campb. 215. *Anon.* 12 Vin. Ab. Ev. A. b. 23. *Remmie v. Hall*, Mann. Ind. 2d edit. 376. *Cray v. Halls*, R. & M. 258. *Thompson v. Austen*, 2 D. & R. 361. *Fletcher v. Froggatt*, 2 C. & P. 569. *R. v. Jones*, 2 C. & P. 630. 2 Ventr. 171. Com. Dig. Ev. B. 5. *Yates v. Carnsew*, 3 C. & P. 99, where a bankrupt was entitled to have his examination read in conjunction with extracts from his books.

(3) *Holland v. Reeves*, 7 C. & P. 38. The paper, which was the machine copy of a letter, was not annexed to the examination.

the whole which was said by his client in the same conversation, not only so much as may explain or qualify the matter introduced upon the previous examination, but even matter not properly connected with the part introduced upon the previous examination, provided only that it relate to the subject matter of the suit: because it would not be just to take part of a conversation as evidence against a party, without giving to the party, at the same time, the benefit of the entire residue of what he said on the same occasion." (1)

But it has been held, that although a defendant is entitled to have the whole of a particular entry in a book read, where a part of it is used against him, yet he cannot insist upon reading distinct entries in different parts of the books. (2) And letters written by a party are evidence against him without producing those to which such letters are answers. (3) The examination of a party, signed by him before commissioners of bankrupt, is evidence against him, though part only of his deposition was noted down. (4) And testimony given in Court, admitting a particular fact, may be used as an admission, though the person examined was prevented from entering into an explanation of the circumstances under which the fact took place, because it was irrelevant to the matter in issue upon the former occasion. (5)

(1) Justice does not seem to require, that a declaration of a party in his own favor should be received in evidence, merely because it occurred in the course of a conversation, in some part of which he made an admission against himself. But it is, probably, more convenient in practice to allow of the whole conversation being given in evidence. It was held, upon the same occasion, that when the conversation between a witness and a third person is given in evidence with a view to affect *the credit of the witness*, it would be irrelevant and incompetent to inquire into parts of the conversation not necessary for explaining the meaning of the words and declarations adduced to discredit the witness. 2 Br. & Bing. 298.

(2) *Catt v. Howard*, 3 St. Ca. 6,

where it was said to be the constant practice *in quo warrantos*. See *Whareham v. Routledge*, 5 Esp. 235. *Rennie v. Hall*, Mann. Index, 376. If one party gives notice to another to produce his books, and inspects them, it seems to have been considered that this makes them evidence for the other side. By Lord Ellenborough, in *Whareham v. Routledge*, 5 Esp. 235. Lord Kenyon appears to have held differently. *Sayer v. Kitchen*, 1 Esp. 209.

(3) *Lord Barrymore v. Taylor*, 1 Esp. 326.

(4) *Milward v. Forbes*, 4 Esp. 172.

(5) *Collet v. Lord Keith*, 4 Esp. 212. It would seem, that the part of a statement which is let in by the party producing it unfavorable to his own case, is not to be con-

When an answer or depositions in Chancery are offered in evidence, as to the admissions of a party upon oath, or for the purpose of contradicting a witness, it appears not to be necessary to produce any of the other proceedings, as the bill, answer, or decree, for the purpose of elucidating the admission. (1) But, where a bill of discovery had been filed, upon which there had been a decree and order for bringing into Court certain letters, it was held, that these letters could not be read in an action at law between the parties to the Chancery suit, without first putting in the bill and answer; (2) for, it was said, the answer might contain such a contradiction or explanation of parts of the letters, as might wholly neutralize their effect.

In the case of *Long v. Champion*, (3) on a trial of an action at law, a copy of a letter written by the plaintiff's agent, and referred to by the plaintiff in his answer to a bill in Chancery,

sidered as an admission for him, so far as to supersede proof by superior evidence. Thus, if the plaintiff, in an action against the sheriff, produce a warrant which recites a writ, it would seem that the sheriff must nevertheless prove the writ, if it be necessary for his own justification. See *Grey v. Smith*, 1 Campb. 387. *Stanley v. Fielden*, 5 B. & A. 425.

(1) *Lady Dartmouth v. Roberts*, 16 East, 334. *Salter v. Turner*, 2 Campb. 87. 3 Campb. 401. *Ewer v. Ambrose*, 4 B. & C. 25. But in general, an answer to a question cannot be read without shewing the question to which it relates. *Rex v. Picton*, Howell's St. Tr. vol. 30, p. 466.

(2) *Hewitt v. Piggot*, 5 C. & P. 77. The letters in question were not written by the plaintiff, but were used against him, as having been in his possession for a long time, by which a presumption was afforded of his having acted upon them. It was held, that the order was admissible of itself, being an act of Court, not affecting the rights of either of the parties. See *Temperley v. Scott*, 5 C. & P. 341. as to reading cross-interrogatories

which are part of a case. A party giving a correspondence in evidence was allowed to put in his letter in reply to the last letter on the other side. *Roe v. Day*, 7 C. & P. 705.

(3) 2 B. & Ad. 284. A case was cited by counsel as having been decided at nisi prius by Lord Tenterden, in which the defendant, (having given the plaintiff notice to produce his books) offered in evidence a copy of one of them, and it turned out on cross-examination, that the witness had obtained an inspection of the book in the Master's office, where it was deposited by an order of the Court of Chancery, as being referred to by a plaintiff in his answer to a bill, and that on that occasion the copy was made: and Lord Tenterden ruled, that this was the same, as if the whole book were appended to the answer, or the answer expanded to the extent of the book; and that advantage could not be taken of an inspection, obtained through a conventional and economical proceeding between the parties in the Chancery suit, to give in evidence a part of the answer, without reading the whole.

and the original of which letter, instead of being filed in the Master's Office, had, by consent of parties, been deposited for inspection with the plaintiff's clerk in Court in the Chancery suit, was held to be admissible evidence on the part of the defendant at law, without reading the answer in Chancery. Lord Tenterden, in his judgment in this case, observed, "whether it is necessary in every instance to read an answer in Chancery, for the purpose of making any documents evidence which may be annexed to it, we do not now decide. I should at present think it a very strong proposition to say, that the answer must at all events be read, though having no connection with the case in which the documents are produced. But here, at least, we think the copy in question was admissible without the answer." Lord Tenterden also observed, that the letter was not regularly before the Court of Chancery in the suit there, as it would have been, if it had been produced in the Court of Chancery and had been filed in the Master's Office.

Where the whole of admissions are received, it often happens that they contain statements favorable to the persons whose admissions they are, and against whom they are used, and in many instances they are found to contain hearsay evidence of facts. The principal ground for receiving the whole admission appears to be, that by comparing the several parts with each other, the true meaning and extent of the admission may be more clearly understood. On this ground, there does not appear to be sufficient reason why the parts of the admission, which may be favorable to the person against whom it is used, should be applied to any other purpose, in the minds of the jury, than that of explaining the parts which appear unfavorable.

Effect of receiving whole admission.

But although it would seem, that the principal ground upon which admissions are received in evidence, is, because it may be presumed, that a person would not speak against his own interest; and that the reason for receiving the whole admission, is only to ascertain, whether the person has in fact spoken against his own interest, and, if so, to what extent, and with what qualifica-

Favorable parts of admission.

tions: yet, it may be collected from authorities, that the effect of receiving the whole admission amounts to something more. It would seem to have been sometimes considered, that it operated as a waiver of any objection to the testimony of the party making the admission, as to all matters contained in it. (1) By this reasoning, the use of the admission, as to those parts in which the probability of its truth is supported by the presumption before mentioned, is deemed a legitimate ground for using it to prove matters, where the presumption in question fails, and a contrary presumption is found to prevail. It is, however, understood, that the several parts of an admission are not necessarily entitled to equal credit; the jury may believe one, and reject the other. (2)

Thus, in *Smith v. Blandy*, (3) in an action for goods sold and delivered, one of the plaintiff's witnesses stated, upon cross-examination, he had heard the plaintiff say, that the goods were sold under a written contract, which the plaintiff at the time shewed the witness. A broker's note was then produced by the plaintiff's counsel, which the witness said was the paper spoken of. It was objected, that the broker's note ought not to be received as evidence of the contract, unless the broker was called to prove it. But the objection was overruled, and it was held by Best, C. J., that the whole of what a party says at the same time, must be given in evidence, though what he says in his favor must not be taken as true, but must be left, under all the circumstances, for the jury to consider whether they believe it or not. And in *Randle v. Blackburn*, (4) it was

(1) Answer of the Judges in the Queen's case, 2 Br. & B. 298. *Randle v. Blackburn*, 5 Taunt. 245. *Smith v. Blandy*, R. & M. 257. See per Chambre, J., in *Roe v. Ferrars*, 2 B. & P. 542, *infra*, and see *infra*, tit. *Confessions*.

(2) *R. v. Clewes*, 4 C. & P. 225.

(3) *Ry. & Mo.* 257. *Cray v. Halls*, cited *ib.*, where Lord Tenterden left the whole of a conversation to a jury, to consider whether the facts asserted by a party

in his own favor, were not true as well as those against him. And see *Remmie v. Hall*, Manning's Index, 2d ed. 376. In *Eq. Ca. Ab.* 10, it is said that, "where a man is charged only by an oath, or a book, the same should be his discharge." See also *Thompson v. Lambe*, 7 Ves. 588. *Ridgway v. Darwin*, 7 Ves. 404.

(4) *Randle v. Blackburn*, 5 Taunt. 245. The plaintiff was only allowed to recover the balance be-

held, that where a person admitted a claim, but at the same time set up a counter claim, the statement of the counter claim was admissible evidence to prove not only its existence, but the truth and correctness of it.

With respect to the case of an admission containing hearsay evidence, some remarks were made on the subject in the case of *Roe* on the demise of *Pellat and others v. Ferrars*, (1) where the defendant gave in evidence an answer in Chancery by the lessors of the plaintiff. Mr. Justice Chambre, observing upon the degree of positive proof which the lessors of the plaintiff had drawn from the answer in their own favor, expressed himself thus:—"It is true that the answer was introduced into the cause by the defendant, on whose behalf some parts of it were read. But in those parts on which the lessors relied, they speak only to 'what they have heard as truth.' I think that was not admissible evidence, for it appears to me, that where one party reads a part of the answer of the other party in evidence, he makes the whole admissible only so far as to waive any objection to the competency of the testimony of the party making the answer, and that he does not thereby admit, as evidence, all the facts, which may happen to have been stated by way of hearsay only in the course of the answer to a bill filed for discovery. "This point," he added, "does not indeed appear to have been contested at the trial; had it been contested, I should have thought the Court bound to send the case down for a new trial."

Hearsay continued in admission.

There appears to be some discrepancy in the authorities at

tween the claim admitted, and the amount of the counter claim. And see *Thompson v. Austen*, 2 D. & R. 361. *Fletcher v. Froggatt*, 2 C. & P. 569, where undue weight appears to have been given to the statement in the defendant's favor. 12 Vin. Abr. tit. Ev. A. b. 23, where a person said, "that he did owe a debt, but that he paid it." *Green v. Dunn*, 3 Campb. 215. *Smith v. Young*, 1 Campb. 439. *Barrymore*

*v. Taylor*, 1 Esp. 325. Com. Dig. Ev. B. 5. 12 Vin. Ab. Ev. A. 23. 2 Vent. 171. *Cooper v. Smith*, 15 East, 103. The point more frequently occurred previously to the alteration of the law respecting debts affected by the Statute of Limitations.

(1) 2 Bos. & Pull. 548. See also the remark of Lord Mansfield in *Bermon v. Woodbridge*, 2 Doug. 788.

Admission of  
writings.

*Nisi Prius*, whether an admission of the contents of a written instrument will supersede the necessity of giving notice to produce it. The point involves the question, how far the doctrine of admissions supersedes the rule hereafter to be considered concerning the rejection of secondary evidence,—how far the principles, upon which that rule is founded, are entitled to less consideration, than the reasons for allowing a party's admissions to be received in evidence. It may be observed, that the evidence, for which admissions are substituted in such cases, is of a superior character to that which is dispensed with in the case of verbal testimony, and also that it is exposed to less danger of being entirely lost. In *Bloxam v. Elsee*, (1) Lord Tenterden held, that a witness could not be asked, what a party to a suit has said as to the contents of deeds executed by himself, without giving the party notice to produce the deeds, or accounting for their non-production. On the other hand, in *Earle v. Picken*, (2) where a witness was asked whether he had not heard the defendant say, that an individual named, had agreed to give a certain sum of money for an estate in question, Mr. Justice J. Parke is reported to have ruled, upon objection taken to the question, that what a party to a suit says, is evidence against himself, whether it relates to the contents of a written instrument or to any thing else. And in a more recent case, where the defendant put in evidence the answer of a plaintiff to a bill in Equity, in which answer the plaintiff

(1) *Bloxam v. Elsee*, 1 C. & P. 558. R. & M. 187.

(2) *Earle v. Picken*, 5 C. & P. 542. *Sewell v. Stubbs*, 1 C. & P. 73, where the plaintiff's admission as to the contents of a note was received. *Doe v. Miles*, 1 St. Ca. 181, notice by partners that partnership has been dissolved, evidence of a dissolution, though partnership were by deed. *Doe v. Watson*, 2 St. Ca. 230, where a landlord's admission of the assignment of his reversion was received. Parol proof of partnership constituted by deed. *Alderson v. Clay*, 1 St. 405. *Harvey v. Key*, 9 B. & C. 356. In *Newman v. Sketch*, 1 M. & M. 338, it

was held, that a declaration of a bankrupt, that he departed his house in order to avoid a writ, is evidence of an act of bankruptcy without proof of the writ, or of a debt, or of the existence of creditors. On admissions of capacity, as assignees of a bankrupt. *Pasmore v. Bousfield*, 1 St. Ca. 296. *Robinson v. Henshaw*, 4 M. & S. 475. *Digby v. Steel*, 3 Campb. 115, admission of property being leasehold. That the necessity of proving a protest is cured by admission of liability. *Gibson v. Coggon*, 2 Campb. 188. *Patterson v. Becher*, 6 B. Moore, 319. *Greenway v. Hindley*, 4 Campb. 52.



stated that he had conveyed certain property by deeds of lease and release, it was held, that the answer was evidence of the conveyance, without notice being required to produce the deeds. (1) It will be seen that when it is proposed to prove an actual conveyance, an admission of it's execution, even made upon oath in an answer in Chancery, will not dispense with calling the subscribing witness; this, however, depends on the principle, that the subscribing witness may be acquainted with facts not within the recollection of the parties to an instrument. (2)

A parol admission appears not to be receivable for the purpose of contradicting documentary evidence. Thus, where a person was proved to be seised of certain lands by documents produced in the cause, his declarations, to the effect that he had a less estate than a fee-simple, were rejected. (3)

A parol admission will not dispense with the production of a record; as, where to prove the discharge of the plaintiff under an insolvent act, it was proposed to give in evidence his admission to that effect; the evidence was held to be insufficient, and it was thought necessary to call the clerk of the peace, and to give in evidence the order of the Quarter Sessions, by which the discharge was effected. (4) So it has been seen, that, in order to prove the incompetency of a witness on the ground of infamy, his own admission of having been convicted is not sufficient, and an examined copy of the record of his conviction must be produced. (5)

Admission of records.

Another rule, defining the legal nature of an admission, is that an offer by a party, either verbal or in writing, ex-

Admissions during treaty.

(1) *Ashmore v. Hardy*, 7 C. & P. 504.

(2) *Per Le Blanc, J., Call v. Dunning*, 4 East, 53. *Abbot v. Plumbe*, Doug. 216. *Cunliffe v. Sefton*, 2 East, 183. *Bowles v. Langworthy*, 5 T. R. 366.

(3) *Harrison and Wife v. Moore*, Nott. Spr. Ass. 1837. *Per Little-dale, J.*, who observed, that in the cases where such declarations had

been received, the declarant's title had rested merely on the fact of possession.

(4) *Scott v. Clare*, 3 Campb. 236.

(5) In this instance there might appear to be some reason for dispensing with the proof of conviction, as the production of the witness may often be a surprise on the opposite party.

pressly stated to be made without prejudice, (1) to pay money by way of compromise, and with a view of buying peace, is not evidence of a debt by way of admission. (2) Where a communication, without prejudice, had taken place between the attorneys of the plaintiff and defendant, and the plaintiff's attorney three months' afterwards called on the defendant to explain, why an earlier answer was not given to a proposition made in the course of the prior communication, it was held, that the evidence of what passed on the second occasion was inadmissible. (3)

The rule under consideration does not apply, where admissions are made without it's being stated, that they are *without prejudice*, (4) or where an agreement, though purporting to be a compromise, has been finally concluded, (as, where it has been signed by the parties and executed,) (5) or where the admissions were made before an arbitrator. In this last case, though the proceedings are said to be before a domestic forum, yet the parties were at the time adversely contesting their rights. (6) The fact of a person having made an offer to compromise a suit, is admissible

(1) *Wallace v. Small*, 1 M. & M. 449, where Lord Tenterden said, that an offer to compromise might be very well made, without any restriction as to confidence. And see *Watts v. Lawson*, *ib.* 447, n. *Nicholson v. Smith*, 3 St. Ca. 129, where the defendant offered a sum of money to settle the action.

(2) *Cory v. Bretton*, 4 C. & P. 462. By Lord Kenyon, in *Gregory v. Howard*, 3 Esp. 113. See by Lord Kenyon, in *Waldridge v. Kenison*, 1 Esp. 143, and in *Turner v. Railton*, 2 Esp. 474. B. N. P. 236. *Harman v. Vanhatton*, 2 Vern. 717. *Turton v. Benson*, 1 P. Wms. 497. The ground for the rejection of the evidence does not seem very clear. It is generally considered that an admission made without prejudice, is not receivable on the ground of policy in protecting such confidential overtures. But it would appear that an offer to get rid of an action has sometimes been held inadmissible on the ground of irre-

levancy, as not amounting to an acknowledgment of right. Thus, in B. N. P. 236, it is said, "If A. sue B. for 100*l.*, and B. offer to pay him 20*l.*, it shall not be received in evidence, for this neither admits nor ascertains any debt, and is no more than saying, he would get rid of the action." In *Rouse v. Redwood*, 1 Esp. 155. Lord Kenyon rejected an admission, as being made to a bailiff on the party being arrested. *Hill v. Elliot*, 5 C. & P. 436. On the distinction between an offer to purchase peace, and an account stated. *Wayman v. Hilliard*, 7 Bing. 101.

(3) *Collins' Ex. v. Wright*, Midl. Spr. Cir. 1837. Per Lord Abinger.

(4) *Wallace v. Small*, 1 M. & M. 446.

(5) *Frognell v. Lewelyn*, 9 Pr. 122, 128.

(6) *Westlake v. Collard*, B. N. P. 236. 1 P. Wms. 497. *Slack v. Buchanan*, Peake, 5. See B. N. P. 236. *Harman v. Van Hatton*, 2

in evidence, and may be material, although it is improper to inquire into the terms offered. (1)

A distinction also is to be made, on this subject, between an admission of some fact connected with the merits of the cause, and an admission of an indifferent fact, as of the handwriting of a party. Thus, on the trial of an action, which had been once withdrawn under a treaty between the parties, Lord Kenyon allowed proof of the defendant's having admitted his acceptance on a bill of exchange, though the admission had been made during the treaty (2); he held, that any admission by the party, respecting the subject matter of the action, pending a treaty on the faith of which it was made, could not be received to his prejudice: but added, that such a fact as that of the party's handwriting, not being connected with the merits of the cause, and capable of being easily proved, stood on different grounds, and that an admission of this fact might be received.

Admission of collateral facts during treaty.

With respect to the question, whether the legal nature of an admission requires it to be voluntary, there appears to be a distinction between civil and criminal cases. It has been considered, that on the trial of civil actions, admissions are receivable in evidence, provided the compulsion, under which they are given, be legal, and the party was not imposed upon, or under duress. (3) Thus it has been held, that an examination be-

Voluntary admission.

Vern. 717. 1 P. Wms. 497. *Waldrige v. Kenneson*, 1 Esp. 143. *Doe v. Evans*, 3 C. & P. 220, where it is said that matters come as adversely before an arbitrator as before any other tribunal. The admissions may be proved by the arbitrator. *Gregory v. Howard*, 3 Esp. 113. The evidence was of facts admitted. *Thompson v. Austen*, 2 D. & R. 358, an offer to refer, where it was said by Mr. Justice Bayley, that the essence of an offer of compromise is, that the party making that offer is willing to submit to a sacrifice, and to make a concession. Lord Kenyon said, that he should receive all such ad-

missions before an arbitrator, which a party would be compelled to make by a bill of discovery. *Slack v. Buchanan*, Peake, 5. *Gregory v. Howard*, 3 Esp. 113.

(1) *Harding v. Jones*, 1 T. G. 135, where the fact of a person having called for the purpose of compromising, was material on a question of disputed handwriting.

(2) *Waldrige v. Kennison*, 1 Esp. N. P. C. 143. Bayley on Wills, 379, 4th edit.

(3) See per Lord Ellenborough, in *Slack v. Buchanan*, Peake, 5. *Collet v. Keith*, 4 Esp. 2112, where the witness was examined on a trial, and was stopped before he had

fore commissioners of bankrupt was evidence against the party making it. (1) And this, notwithstanding the party might have demurred to the questions, as exposing him to penalties.

With regard to criminal trials, it has indeed been ruled, that an examination before a committee of the House of Commons, was evidence in the trial of a misdemeanor; (2) though it was objected, that the party, against whom the admission was used, could not have refused to answer the question, without being punished as for a contempt of the House. But in a late case, it was held, that the balance sheet of a bankrupt, given on oath under his commission, was not admissible against him upon a criminal charge for concealing his effects. (3)

Indirect admissions.

There is a species of admissions, wherein the existence and truth of the fact to be proved is assumed in the expressions which are given in evidence. The expressions, in such cases, are received as admissions of the fact, though they were used for a different purpose from that of acknowledging it; and, as admissions, they are allowed to supersede the necessity of producing more direct evidence.

Thus, where in an action against the acceptor of a bill, his attorney gave notice to produce "all papers relating to a bill,"

concluded his testimony. *Stockfleth v. De Tastet*, 4 Camp. 10. *Vide infra*, on the obligation of witnesses to answer questions subjecting them to civil actions. The statute, which compels them to answer, appears to presume, that the answer of witnesses, though compulsory, may be used against them as admissions. In another statute 7 & 8 G. 4, c. 29, compulsory examinations are rendered inadmissible upon indictments for the offences thereby created.

(1) *Stockfleth v. De Tastet*, 4 Camb. 10. *Robson v. Alexander*, 1 B. & P. 448. *Smith v. Beadnell*, 1 Camp. 30. *Milward v. Forbes*, 4 Esp. 172. It would seem that such an examination could not be used as evidence of an account stated, *Tucker*

*v. Barrow*, 7 B. & C. 624. See *Smith v. Beadnell*, 1 Camp. 50.

(2) *Rex v. Merceron*, 2 Stark. C. 366. The evidence was admitted upon an indictment for a misdemeanor. The defendant had been compelled to appear before the committee. The doctrine of confessions does not appear to have been adverted to.

(3) *Rex v. Britton*, 1 M. & Ro. 297, by Patteson, J., and Alderson, J. *Vide infra*, the doctrine of confessions, upon the principles of which the distinction appears to be founded. A bond with a penalty given by a defendant, alleging himself to be guilty of a nuisance, is evidence upon a trial for the misdemeanor, *Rex v. Neville, Peake*, 91.

(described as in the declaration) "accepted by the defendant." This notice to produce was held to furnish *prima facie* evidence of the acceptance of the bill. (1) Where an auctioneer advertised for sale the property of J. S. a bankrupt, this was held to be evidence of the title of the assignees in an action against the auctioneer. (2) An undertaking by an attorney on the record to appear for two persons, described in the undertaking as joint owners of a ship, is evidence of joint ownership. (3)

There is another species of implied admission, where a party has assumed a particular character, or where by his conduct or language in the transaction in question, or in previous transactions of a similar nature, he has assumed the existence of the title upon which the opposite party relies. In speaking of cases of this latter description, Lord Ellenborough observes, in *Dickenson v. Coward*, (4) "I take it to be quite clear that any recognition of a person standing in a given relation to others, is *prima facie* evidence against the person making such recognition, that such relation exists."

On an information against a military officer for making false returns, it is sufficient to prove that he acted in the character alleged in the charge, without adducing direct evidence of his appointment. (5) In an action for penalties against a collector of taxes, proof of his collecting the taxes is sufficient

(1) *Hill v. Squire*, R. & M. 282.

(2) *Maltby v. Christie*, 1 Esp. 340, commented on 16 East, 193, the evidence was said to be conclusive, on the ground that it imported an authority from the assignees; for the bankruptcy would have put an end to every authority, which the bankrupt might have given to sell the goods.

(3) *Marshall v. Cliff*, 4 Camp. 133. To state upon an appeal that those against whose acts the complaint is made are Justices, is an admission of their jurisdiction: *Rex v. Fisher*, Cald. 135.

(4) 1 B. & A. 679, recognised by Lord Lyndhurst, in *Inglis v. Spence*, 1 Cr. M. & R. 436. It has been said that payment of money is evidence against the payer of the title of the party receiving it, but is not evidence against the receiver that the payer was the party bound to pay it. *James v. Birn*, 2 Sim. & Stu. 606.

(5) *Rex v. Gardner*, 2 Camp. 513. The fact of acting appeared from the returns themselves, in which the defendant described himself as Major-Commandant.

evidence of his being collector, though his appointment is by warrant under an act of parliament. (1) In an action against a clergyman for non-residence, the acts of the defendant as parson, and his receipt of the emoluments of the church, have been considered good evidence against him of his being parson, without formal proof of his title. (2) Upon an indictment for embezzlement against a letter-carrier, proof that he acted as such, was held sufficient without shewing his appointment. (3)

In an action for penalties under the post-horse act, brought by the plaintiff as farmer-general, proof of his appointment was dispensed with, because the defendant had previously accounted with him as farmer-general. (4) In an action for subtraction of tithes, proof of the defendant's former acknowledgment of the plaintiff's title to the tithes, was thought to be sufficient evidence as against the defendant, a wrong doer. (5) In an action by the clerk of the trustees of a turnpike road,

(1) *Lister, q. t. v. Priestly, Whitew.* 67. In several of the cases under this head, the evidence would be receivable independently of the doctrine of admissions in consequence of the rule, that acting in a particular capacity is presumptive evidence of a due appointment.

(2) By *Chambre, J.*, 1 N. R. 210. *Bevan, q. t. v. Williams*, 3 T. R. 635, n. (a). The evidence is spoken of by Lord Kenyon as *decisive*. See *Rex v. Kerne*, 2 St. Tr. 964. *Rex v. Bromwich*, 2 St. Tr. 966, proof of officiating as a Romish priest, held evidence of taking orders. And see *Rex v. Topham*, 4 T. R. 126. Proof that A. B., as the proprietor of a newspaper, had given security for the payment of duties on advertisements, and had from time to time applied to the stamp office, concerning duties on the paper, was held to be evidence of his being the publisher. Where a lessee covenanted, that a lease should be avoided, on a bankruptcy, proof of submission to a commission was

held to be evidence of bankruptcy, *Doe v. Hodgson*, per Lord Tenterden, Sitt. after Easter Term, 1823, 2 St. Ev. 20.

(3) *Barrett's case*, 6 C. & P. 124.

(4) *Radford, q. t. v. Mackintosh*, 3 T. R. 632. And see *Cross v. Kaye*, 6 T. R. 663, and 1 N. R. 205, 211. *Peacock v. Harris*, 10 East, 105. In *Smith v. Taylor*, 1 N. R. 211. *Chambre, J.*, appears to have considered the case of *Radford v. Mackintosh*, as deciding that the evidence was an estoppel, for he says, "that he thought the principle was pushed too far in that decision; and that it would have been just, if the evidence had been decided as enough to put the defendant upon proof of a negative." As to the effect of admissions, whether they are conclusive by way of estoppel, or only *prima facie* evidence, *vide infra*, p. 378.

(5) 1 N. R. 210. 3 T. R. 635. 4 T. R. 366. *Chapman v. Beard*, 3 Anstr. 492.

brought against one of the trustees, the fact that the plaintiff had acted as clerk, and that the defendant had acknowledged him as such, is evidence of the plaintiff's appointment. (1) In an action by the assignee of a bankrupt, proof that the defendant had attended a meeting of the commissioners, and exhibited an account between him and the bankrupt, claiming certain deductions, and afterwards made the plaintiff a part payment, this was held to be *prima facie* evidence of the plaintiff's title to sue as assignee; but the Court observed, that it was certainly not conclusive. (2)

In an action against the defendant for slander, for charging the plaintiff with being a swindler, and threatening that he would have him struck off the roll of attornies, the Court was of opinion, that the defendant's threat amounted to a distinct acknowledgment that the plaintiff was an attorney, and dispensed with further proof. (3)

Upon the principle of the above mentioned cases, two of the Judges of the Court of Common Pleas were of opinion, that the plaintiff was entitled to recover in the case of *Smith v. Taylor*. (4) That was an action for defamation, in which the plaintiff averred, that he was a physician, and exercised

Words implying qualifications.

(1) *Pritchard v. Walker*, 3 C. & P. 212.

(2) *Dickenson v. Coward*, 1 B. & A. 679. *Inglis v. Spence*, 1 Cr. M. & R. 432, admission of title in letters to solicitor of commission, see *Crofton v. Poole*, 1 B. & Ad. 568. *Rex v. Barnes*, 1 St. 243. *Clarke v. Clarke*, 6 Esp. 61. *Leke v. Howe*, 6 Esp. 20. *Mercer v. Wise*, 3 Esp. 219. *Havelock v. Cook*, 5 T. R. 655. *Pope v. Monk*, 2 C. & P. 112. *Walker v. Burnell*, Doug. 303. *Mott v. Mills*, 3 C. & P. 197, on the effect of 6 Geo. 4, c. 16, as to bankrupt petitioning for his discharge. Further on the effect of admissions in bankruptcy, *infra*, 379, n.

(3) *Berryman v. Wise*, 4 T. R. 366, recognised in *Pearce v. Whale*, 5 B. & C. 39, thereby superseding the necessity of proving the admis-

sion as an attorney, or a copy of the Roll. In an action for bribing one who had a vote at an election, the very offer to bribe is evidence against the defendant, that the party solicited had a right to vote, *Combe v. Pitt*, Burr. 1586. *Regg v. Cargenven*, 2 Wils. 395. In both the cases the person bribed was admitted to vote. But Lord Mansfield and the rest of the Court held, that a man who had given money to another for his vote, should not be admitted to say that he had no vote. As to the conclusive effect of the admission, *vide infra*, p. 384, n.

(4) 1 New Rep. 196, by Mansfield, C. J., and Heath, J.; but Rook, J., and Chambre, J., were of opinion, that the words did not admit the qualification.

Words not so  
implying.

the profession, and that the words were spoken concerning him as a physician. It appeared, that the words did not impute want of *qualification* by degree, but only want of *skill* in practice; and that the defendant called the plaintiff "*Dr. S.*," when he spoke the words: and, further, the defendant, as an apothecary, had followed the directions of the plaintiff as a physician, in the business out of which the cause of action arose. These circumstances were considered by two of the Judges, against the opinion of the other two, as sufficient *prima facie* evidence of the plaintiff's qualification. On the other hand, if the words imply a charge, that the plaintiff was not qualified to act in the particular character which he assumed, it has been held that the qualification ought to be proved, and that it will not be sufficient to show his acting in that capacity. (1)

Admissions by  
demeanor.

Acquiescence.

In the preceding cases, the admissions were in the form of written or verbal statements made by the parties, or of acts done by them. But in some cases, it is allowable to give evidence of written or verbal statements, or of acts done by others, which a party to be affected by them is proved to have seen or heard, and thus to use the conduct, expressions, or demeanor of the party, as evidence by way of admission against him. (2) The evidence in such cases is altogether presumptive in its quality and character.

It very commonly happens, that evidence of the description referred to has the effect of misleading juries, who are frequently influenced by it, in consequence of giving credit to it

(1) See the judgment of Mansfield, C. J., in 1 New Rep. 204, 207. Pickford v. Gutch, 8 T. R. 395, n. (a); Moises v. Thornton, 8 T. R. 303, where the words imply mere negligence or ignorance, without admitting the plaintiff to be qualified, and the plaintiff avers that he is qualified, he will be bound to prove his qualification, 1 N. R. 204, 207. And see Collins v. Carnegie, 1 Ad. & E. 703, where it is said that a person, complaining of

slander upon him in a particular character, must prove that he possesses that character, when the slander does not admit it.

(2) A notorious instance of the misapplication of this kind of evidence occurred in the trial of Algernon Sidney. Upon his indignantly refusing to cross-examine Lord Howard, the Attorney-General retorted "Silence — you know the proverb."



as hearsay testimony, and are unable, notwithstanding any directions from a Judge, to regard it solely as exhibiting demeanor and conduct. And in many instances, especially where no observation has been made by the party against whom the statement is made, on hearing it, the evidence is particularly liable to produce erroneous conclusions. An acquiescence in the truth of the statement is frequently inferred, though that inference may, from a variety of causes, be incorrect. (1) Thus the evidence is not only fallacious with reference to it's object, but in it's collateral effect is prejudicial to the investigation of truth. The acquiescence of a party is still less entitled to consideration, where he has no means of personally knowing the truth or falsehood of a statement. (2)

A notice to quit at a certain time is evidence that the tenancy commenced at that period, if the notice was served personally on the tenant, and if he made no objection to the time of quitting mentioned in the notice. (3) The circumstance of his not making such an objection has been considered as *prima facie* evidence of admission and acquiescence. So, it has been held, the demeanor and conduct of a bankrupt, pending the investigation of his accounts before commissioners of bankrupt, may amount to an admission of a petitioning creditor's debt, though what was done before the commissioners did not derive any authority from it's being done before them as commissioners or as arbitrators. (4) And the forbearing from acts

(1) This species of evidence is very commonly used in criminal cases, although it appears to be somewhat inconsistent to hold, that the prisoner's silence on hearing an accusation is evidence against him, when his denial of the charge upon such an occasion would not be evidence for him. On the principle that the evidence is received, not on the ground of credit given to the hearsay narrative, but on the ground of it's apparent effect in the prisoner's demeanor, it has been held, that what is said in the presence of a prisoner, by his wife, is receivable in evidence against him. *Rex v. Smithies*, 5 C. & P. 332.

See *Rex v. Swatkins*, 4 C. & P. 548. 1 East's P. C. 357. B. N. P. 28.

(2) See per Parke, J., in *Hayslep v. Gymer*, 1 Ad. & E. 165, and per Patteson, J., *ib.*

(3) *Doe d. Clarges v. Foster*, 13 East, 405. *Doe d. Leicester v. Biggs*, 2 Taunt. 109. *Doe d. Baker v. Woombwell*, 2 Camp. 559. If the tenant did not look at the notice or could not read, the presumption of acquiescence will be repelled. *Thomas d. Jones v. Thomas*, 2 Camp. 647. *Doe v. Forster*, 13 East, 405. *Doe v. Briggs*, 2 Taunt. 109.

(4) *Jarrat v. Leonard*, 2 M. & S. 269, and see *Smith v. Moon*, 1 M.

of ownership, and neglecting to interpose, whilst another person exercises such acts, or incurs expenses in buildings or alterations inconsistent with a title afterwards claimed, is evidence for the jury in the nature of an admission. (1)

In an action brought to recover back notes delivered to the defendant by the plaintiff, the plaintiff proved that the defendant, who was the executor of a deceased person, having questioned the plaintiff as to her having possession of some property belonging to the deceased, the plaintiff handed over the notes to the defendant, stating that the deceased had given them to her: the defendant did not deny the statement, but had no means of knowing it's truth or falsehood: it was held, that although such evidence of acquiescence in the truth of the statement was an admission entitled but to very little weight, yet that it was properly submitted to a jury. (2)

But in *Fairlie v. Denton*, (3) it was held by Lord Tenterden, that if the plaintiff write a letter to the defendant, which the defendant does not answer, the plaintiff has no right to have the contents read at the trial, by way of admissions from ac-

& M. 460. *Key v. Shaw*, 8 Bing. 320, that a trader hearing himself denied, and not coming forward, may thereby commit an act of bankruptcy.

(1) *Doe v. Pye*, 1 Esp. 364. *Neale v. Parkin*, 1 Esp. 229. *Hollis v. Goldfinch*, 1 B. & C. 222. *Steel v. Prickett*, 2 St. 471. *Stanley v. White*, 14 East, 332. 4 T. R. 516. 1 B. & C. 222. *Jarret v. Leonard*, 2 M. & S. 265. *Morris v. Burdett*, 1 Camp. 218. *Doe v. Allen*, 3 Taunt. 78. Concerning acts amounting to a recognition of lawful occupancy, such as will be a defence upon an ejectment. *Doe v. Cadwallader*, 2 B. & Ad. 473, in which *Doe v. Hales*, 7 Bing. 322, is doubted. As to cases between landlord and tenant, where subsequent acts amount to a waiver of a notice to quit, 1 H. Bl. 311. Cowp. 243. 6 T. R. 219. 16 East, 53. Acts of ownership are admissible independently of acquiescence. Per

*Parke, B.*, in *Jones v. Williams*, 2 M. & W. 327.

(2) *Hayslep v. Gymer*, 1 Ad. & E. 162.

(3) 3 C. & P. 103. Lord Tenterden observed, that what is said to a man before his face, he is in some degree called on to contradict, if he does not acquiesce in it; but the not answering a letter is quite different; and it is too much to say, that a man, by omitting to answer a letter at all events, admits the truth of the statements the letter contains. It was held in the same case, that a line of the letter might be read which contained a demand of a certain amount, but not any other part which stated any supposed fact or facts. See *Rex v. Plumer*, R. & R. 264, that a letter found in the possession of a prisoner is not evidence of it's contents; as, for instance, to shew that a bill was inclosed in it.

quiescence. It was stated by Chief Justice Best, in *Child v. Grace*, (1) to be a rule applicable to this subject, that what is said by a party to a suit to the opposite party may sometimes be evidence, but not what is said by a stranger, unless it draws forth an answer: and added, that the same distinction had been made by Chief Justice Gibbs.

In some cases the possession of documents, or the circumstance that a party has access to them, has been considered as a ground for affecting persons with the admission of the facts stated in them. Thus, in an action against a tavern keeper, it appeared that the defendant belonged to a club, which was held at the plaintiff's house, and that in a room where the club met, a book used regularly to be kept open, in which the plaintiff's servants entered the articles, as they were ordered by the members of the club, who had hereby an opportunity of inspecting and correcting the account: Lord Kenyon admitted the book as evidence of the delivery, though it was not proved, that the servants who made the entry were dead, nor was their absence accounted for, and only their handwriting was proved. The daily account in the book was in this case considered as tantamount to a bill delivered and admitted by the defendant. (2) And apparently upon the same principle it was held, that an entry in the books of the South Sea Company, of the minutes of a license granted by them, was admissible in evidence, without calling as a witness the officer who made the entry. (3)

Admission by  
possession of  
documents.

(1) 2 C. & P. 193, action for an assault. The evidence tendered was, what a magistrate at a police office had said, in the presence of the defendant, respecting the assault. The Chief Justice observed, that the counsel were driving at the opinion of the magistrate. The like evidence as to what a Judge has said upon the trial of an indictment, has been admitted upon an action for a malicious prosecution, on the ground that what the Judge said, was in the hearsay of the prosecutor; but as the prosecutor had no power to interpose, it would seem that the reason failed.

(2) *Wiltzie v. Adamson*, K. B. Sitt. after Mich. Term, 1789. And see *Alderson v. Clay*, 1 St. Ca. 405, after a person was proved to be a member of a society, the entries in a book containing a record of the proceedings of the society produced at the meetings, and open to the inspection of all the members, were admissible against him. *Raggett v. Musgrove*, 2 C. & P. 556.

(3) *Hodgson v. Fullarton*, 4 Taunt. 787. And see *Hewitt v. Piggot*, 5 C. & P. 77, possession of letters. *Roe v. Rawlins*, 7 East, 290, possession of survey.

Though the rolls of a manor are accessible to all the copyholders, yet in questions between them and the lord of the manor, it would seem that entries on the rolls of the manor are not generally evidence against them by way of admission. (1) But in questions as to manorial customs between copyholders, or between copyholders and strangers, it seems that entries on the rolls of the manor, besides being evidence of reputation, independently of any weight they may derive from being admissions, are also upon this ground entitled to some additional force. (2) And the possession of letters and paper writings by prisoners, may affect them with the imputation of approving or acting the matters contained in them. But for this purpose it is necessary, that the jury should be satisfied that the letters or other writings were in the possession of the prisoners previous to their apprehension. (3) In an action by a bankrupt against his assignees, depositions of persons enrolled by the assignees are not evidence against them as admissions, by reason of the enrolment. (4)

Although partnership books are evidence against partners as being the acts and declarations of such partners, being kept under their superintendence, yet the books of a corporate company are not evidence against a member of the company, as entering into a contract with the company: in such respect, he is to be regarded as a stranger. (5)

Admission by  
conduct.

The conduct of parties frequently affords evidence in the nature of admissions, when it is inconsistent with the claims asserted by them, although it be not, as in the cases before noticed, in the nature of acquiescence in the acts of another

(1) *Dean and Chapter of Ely v. Caldecott*, 7 Bing. 433. An ancient steward's book of assessment of fines, not admitted in an action by the lord, for copyhold fines.

(2) *Vide infra*, as to admissions of persons, in *pari jure*. See *Gilb. L. Ev.* 235. 4 T. R. 670. 5 T. R. 26. 2 M. & S. 92. 13 East, 10. 3 Wils. 63. 3 T. R. 162. 1 T. R. 466.

(3) See *Horne Tooke's case*, 25

*Howell*, 120. *Watson's case*, 2 St. 140.

(4) *Chambers v. Bernasconi*, 1 Cr. M. & R. 347. A feoffment having an indorsement of living seisin is not evidence of the fact against the person producing the deed from his custody: *Doe d. Wilkins v. Lord Cleveland*, 9 B. & C. 870.

(5) *Hill v. Manchester W. W.*, 5 B. & Ad. 875.

person. Thus, in an action of debt, evidence that the plaintiff has taken the benefit of the insolvent act, and has not inserted the debt in question in his schedule, is an admission of it's not being due. (1) Where a tradesman makes out an account for goods sold, in the name of a particular person, it must be taken that they were furnished upon the credit of such person, unless it be shewn, by unequivocal evidence, that the credit was in fact given to another. (2)

But the deposition of a witness, taken in a criminal proceeding before a magistrate, in the presence of the party charged, is not admissible in another proceeding against that party: in investigations of this nature, the person charged has not the same facility of interposing, as he would have in a common conversation; and therefore, the same inferences cannot be drawn from his silence or his conduct. (3)

Admission not implied.

Where admissions involve matters of law as well as matters of fact, they are obviously, in many instances, entitled to very little weight, and in some cases they have been altogether rejected. Thus it has been held, that the discharge of a defendant by a Court of Quarter Sessions, under an insolvent act, could not be established by proof of an acknowledgment of the discharge by the plaintiff himself; for the discharge might have been irregular and void, or might have been mistaken by the plaintiff. (4)

Admission of law.

(1) *Nicholls v. Downes*, 1 M. & Ro. 13.

(2) *Storr v. Scott*, 6 C. & P. 241. *Thompson v. Davenport*, 9 B. & C. 86.

(3) *Melun v. Andrewes*, 1 M. & M. 337. 2 C. & P. 193. *Rex v. Appleby*, 3 St. Ca. 33. See *Finden v. Westlake*, 1 M. & M. 461.

(4) *Scott v. Clare*, 3 Camp. 236. *Summerset v. Adamson*, 1 Bing. 73, to the like effect. An admission by a defendant, on being arrested, and when he was ignorant whether he was bound by law to make the payment or not, was held inadmissible, by Lord Kenyon, *Rouse v.*

*Redwood*, 1 Esp. 155. It seems to have been considered in *Morris v. Miller*, Burr. 2057, see Dr. *Smith v. Miller*, cited 2 Wils. 399, that in an action for criminal conversation, an acknowledgment that the defendant had committed adultery with the wife of the plaintiff was not sufficient, without proof of a marriage in fact. In a subsequent case, 2 Wils. 399, it was said, "that a defendant saying in jest or in a loose rambling talk, that he had lain with the plaintiff's wife, would not be sufficient alone to convict him in that action; but if the defendant had seriously and

Effect of admissions.  
Conclusive admissions.

With respect to the effect to be attributed to admissions, it is to be observed, that proof of a party to the suit having made representations of facts, for particular purposes, and on particular occasions, may preclude him from relying on a case which is inconsistent with those representations; thus operating as an estoppel. The kind of representations which have been held to have this effect, seems for the most part to be, where on the faith of them a court of justice has been induced to adopt a particular course of proceeding, or where other persons have on the faith of the representations been led to alter their condition. In some of the cases, the Courts appear to have considered, that the general rules respecting the qualities of estoppels did not apply to representations of the nature in question. In others, the representations have been treated, for some purposes at least, as a branch of estoppels properly so called, and it has been held that, as being estoppels, they were not receivable in evidence except between parties and privies. But with regard to the rule of pleading estoppels specially, it seems that this rule does not apply to the representations in question, at least where they arise by matter of evidence. (1)

In *Herne v. Rogers*, (2) the rule upon the subject was laid

solemnly recognised, that he knew the woman he had lain with was the plaintiff's wife, we think it would be evidence proper to be left to the jury, without proving the marriage." See *Freeman's case*, East's P. C. 470. In *Norwood's case*, East's P. C. 470, confessions and cohabitation were admitted to prove the relation of husband and wife in a case of petit treason. In a case mentioned in 2 Stark. Ev. 654, a prisoner was convicted of bigamy on proof of his deliberate admission of both marriages, in the presence of his first wife, before a magistrate. However, in *Wilson v. Mitchell*, 3 Camp. 393. Lord Ellenborough held, that an acknowledgment by a plaintiff that she

was married to a particular individual was not sufficient to support a defence of coverture without evidence of an actual marriage.

(1) See per Lord Tenterden, in *Watson v. Wace*, 5 B. & C. 155. Per Bayley, J., in *Herne v. Rogers*, 9 B. & C. 586. According to the old law there might be an estoppel by matter in pais. Com. Dig. *Estoppel*. There does not appear to be any instance of the representations under consideration having been specially pleaded as estoppels. But in the case of a jury not giving such an effect to the representations, a new trial would probably be granted *toties quoties*.

(2) 9 B. & C. 586, by Bayley, J. The case determined that a bank-

down in these terms :—" The express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence against him ; but he is at liberty to prove, that such admissions were mistaken or were untrue, and he is not estopped or concluded by them, unless another person has been induced by them to alter his condition ; in such a case a party is estopped from disputing their truth, with respect to that person and those claiming under him ; but as to third persons he is not bound."

In an action of trespass, commenced in order to try the validity of a commission of bankruptcy issued against the plaintiff, where it was proved by the defendants, that the commission issued against the plaintiff in custody at the suit of the petitioning creditor, who was one of the defendants, and that the plaintiff had afterwards applied to the Court of King's Bench under the 49 Geo. 3, c. 121, s. 14, on the ground that he had become bankrupt, and that his detaining creditor had proved under the commission, it was held, that the plaintiff could not dispute the validity of the commission. Lord Ten-

rupt was not estopped from bringing an action against his assignees, by having given up his lease to his lessors, on the ground that the assignees were not parties or privies to the transaction. The doctrine of estoppels, Co. Litt. 352 a. Com. Dig. *Estoppel*, C., was referred to. With respect to the estoppels in matters of bankruptcy, in *Clarke v. Clarke*, 6 Esp. 61, a bankrupt was estopped by acting in the sale of his effects. In *Lake v. Howe*, 6 Esp. 20, a bankrupt was estopped from questioning the title of persons, whom he, by his conduct, had procured to become assignees. See *Flower v. Herbert*, 2 Ves. 326, that a surrender by a bankrupt to commissioners is no estoppel. *Rankin v. Horner*, 16 East, 191, proof of debt not an admission. It had been, before considered an estoppel, per Lord Mansfield, *Walker v. Burnell*, cited 3 T. R. 322.

The admission in *Maltby v. Christie*, 1 Esp. 340, cited 16 East, 193, and *supra*, p. 364, was treated by Lord Kenyon as conclusive. Further on admissions in bankruptcy, *supra*, 371, n. In *Graves v. Key*, 3 B. & Ad. 318, the Court lay down a general rule, that an admission, though evidence against the person making it, and those claiming under him, is not conclusive evidence, except as to the person who may have been induced by it to alter his condition. In that case parol evidence was admitted, to shew why a receipt, indorsed on a bill or note, was so indorsed, and by whom the money therein mentioned was paid. The nonsuit, which was set aside by the Court, proceeded on the ground, that the receipt was conclusive evidence, that the bill had been paid by the acceptor.

terden said, that "the estoppel arose by matter of evidence, and the question was, whether a party having availed himself of the commission for one purpose, can afterwards be allowed to assert to the same Judges, before whom he took the benefit of the commission, that the commission was invalid. Lord Ellenborough (1) gave his opinion to the contrary, and that has never since been questioned." (2)

A petitioning creditor, who had sued out a commission of bankruptcy upon an affidavit, stating the fact of bankruptcy, has been held to be afterwards estopped from questioning that fact. And it was said by the Court, that those who had treated a party as a bankrupt, should not afterwards be allowed to gainsay their own assertions. (3)

In an action for tolls, where a defendant had accounted with the plaintiff, and received credit from him as collector of certain turnpike tolls, but who had not been legally appointed, it was held that, after such an admission of the plaintiff being a person to be accounted with for the tolls, the defendant should not be permitted to dispute his title to recover the balance of the account. (4)

(1) In *Goldie v. Gunston*, 4 Camp. 381.

(2) *Watson v. Wace*, 5 B. & C. 153, the plaintiff was nonsuited. It was contended, on the part of the plaintiff, that the estoppel was not mutual, and had not been pleaded, and was inferential and not direct. But Lord Tenterden said, that this was not the case of an estoppel, strictly and technically so called, and that it arose by matter of evidence. In *Hearne v. Rogers*, 9 B. & C. 577. *Supra*, p. 378, where representations of the nature in question were considered as being governed by the strict doctrine of estoppels, it was suggested that it was a fact material to the decision of *Watson v. Wace*, that one of the defendants was the person from whose suit the plaintiff had been discharged. See *Goldie v. Gunston*,

4 Camp. 381. *Mercer v. Wise*, 2 Esp. 219.

(3) *Ledbetter v. Salt*, 4 Bing. 626. The action was brought by the assignee under the second commission. There does not appear to have been any mutuality in the estoppel, nor was it pleaded. And see *Groves v. Western Canal Company*, 5 M. & S. 76. *Harmar v. Davis*, 7 Taunt. 577, estoppels of petitioning creditors. In *Dowden v. Fowle*, 4 Camp. 38, an admission of a petitioning creditor, who was also assignee of a bankrupt, was used *against* himself and his co-assignees, though it was contrary to his affidavit.

(4) *Peacock v. Harris*, 10 East, 106, the action was by the administratrix of the collector. The case was compared by Lord Ellenborough to that of a tenant disputing



A person who has described himself as a physician cannot afterwards maintain an action for fees. (1) A vendee of goods, who has given to the vendor a bill of exchange in payment, cannot afterwards dispute the reasonableness of the charge. (2) And if a man hold out a woman as his wife, he cannot set up as a defence to an action for necessities that she was not his wife. (3) In like manner a person may sometimes be estopped from taking advantage of a misnomer in process. (4)

Where a person has held himself out as a partner to a particular individual, or under such circumstances of publicity, that it may be presumed that the individual acted on the faith of his being a partner, he will be precluded from disputing his liability as a partner. (5) Thus, where a person allows his name to remain in a firm, either exposed to the public over a shop door, or to be used in printed invoices or bills of parcels, or to be published in advertisements, he is estopped from disputing his liability as a partner. (6)

On the same principle is founded the rule, that a tenant can-

his landlord's title. The collector having sent his bill to the defendant, the defendant sent back 5*l.*, with a message, that the remainder should be paid in the next week. In *Dickenson v. Coward*, 1 B. & A. 679, the Court appear to have considered, that accounting and paying to a person in a particular capacity was only *prima facie* evidence of his title.

(1) *Chorley v. Bolcott*, 4 T. R. 317. *Lipscombe v. Holmes*, 2 Camp. 441.

(2) *Nash v. Turner*, 1 Esp. 217. *Solomon v. Turner*, 1 St. 51. *Knox v. Walley*, 1 Esp. 159.

(3) *Robinson v. Nahon*, 1 Camp. 245. *Watson v. Threlkeld*, 2 Esp. 637. See *Munro v. De Chemant*, 4 Camp. 215. That the estoppel ceases on separation. By Beat, C. J., in *Bathews v. Galindo*, 4 Bing. 614. But a person holding out a woman as his wife may afterwards call her as a witness. *Bathews v. Galindo*, 4 Bing. 614, overruling Lord Kenyon's decision in *Adey's case*, *Leach*, 245, though

*Park, J.*, appears to have considered the decisions as reconcileable, inasmuch as in *Adey's case*, the prisoner had called the woman his wife in his address to the jury. In *Mace v. Cadell*, Cowp. 233, cited by *Gazelee, J.*, 4 Bing. 613, after a woman had been entered in excise books as "married" she was not allowed to claim goods as her sole property against assignees of the person for whose wife she passed.

(4) *Reeves v. Slater*, 7 B. & C. 487. *Gould v. Barnes*, 3 Taunt. 488. *Price v. Harwood*, 3 Camp. 108. *Morgan v. Bridges*, 2 St. 314.

(5) Per *Parke, J.*, *Dickenson v. Valpy*, 10 B. & C. 140. Per Lord Kenyon, *De Bertram v. Smith*, 1 Esp. 29. *Kell v. Rainby*, 10 B. & C. 21. *Genden v. Robson*, 2 Camp. 302.

(6) Per *Tindal, C. J.*, in *Fox v. Clifton*, 6 Bing. 794. The knowledge and assent of the partner is essential in such cases, *ib.* *Mewsome v. Coles*, 2 Camp. 617.

not dispute his landlord's title. Where a tenancy is created by a lease by deed indented, the tenant may be estopped from saying any thing repugnant to it, according to the strict law of estoppels as applicable to deeds. (1) Where the lease is not by deed, the tenant or any person claiming under him is precluded from objecting to the title of a landlord from whom he has received possession, or to the title of any party claiming under his landlord. (2) But a mere attornment without payment of rent, amounting to a bare assent, does not create an estoppel. (3) And payment of rent to another party than him under whom the tenant came originally into possession, may be shewn to have been done under a misrepresentation, or under other circumstances not entitling the party to receive it. (4) The

(1) Co. Litt. 47 b. *Strowd v. Willis*, Cro. Eliz. 362. *Brudenell v. Roberts*, 2 Wils. 143. *Syivan v. Stradling*, *ib.* 208. *Wilkins v. Wingate*, 6 T. R. 62. *Parker v. Manning*, 7 T. R. 537. *Blake v. Foster*, 8 T. R. 487, that the lessor had an equitable estate. *Cook v. Loxley*, 5 T. R. 4. *Brooksby v. Watts*, 6 Taunt. 333. *Frogmorton v. Scott*, 2 East, 467, illegal possession. *Hodson v. Sharpe*, 10 East, 350, informal lease. A lease by deed poll is not an estoppel. Co. Litt. 369 b. Bac. Ab. *Leases*, O. A lease from a *feme covert*, infant, or from the crown, is not an estoppel, for want of mutuality. Bac. Ab. *Leases*, O. Co. Litt. 352. Cro. Eliz. 36. Say. 13. *Morgan v. Ambrose*, Peake, Ev. 242. B. N. P. 139. 2 Ves. Jun. 696. 11 Ves. 344. *Palmer v. Ekins*, Lord Raym. 1552. *Atkinson v. Pierrepoint*, Esp. Dig. 30. *Phipps v. Sculthorpe*, 1 B. & A. 50. *Parry v. House*, Holt. C. 489.

(2) *Doe d. Manton v. Austin*, 9 Bing. 45. *Doe v. Smythe*, 4 M. & S. 347. *Doe d. Bristow v. Pegge*, 1 T. R. 760, n. *Parry v. House*, where the title was founded on fraud. Holt, 489. *Cooke v. Loxley*, 5 T. R. 4. *Phipps v. Sculthorpe*, 1 B. & A. 50. *Hull v. Vaughan*, 6 Pr. 157. *Fleming v. Gooding*, 10 Bing. 549. *Rennie v. Robinson*, 1 Bing. 147. In like

manner a copyholder who has been admitted and done fealty cannot dispute the title of the lord. *Doe d. Nepean v. Budden*, 3 B. & A. 626. With respect to the estoppel on a mortgagor from disputing the title of the mortgagee, see cases cited in *Right v. Bucknell*, 3 B. & Ad. 278. In *Cornish v. Searall*, 8 B. & C. 471, it was held, that the title of a person, to whom the tenant had attorned, but from whom he had not received possession, might be disputed. And Mr. Justice Bayley said, that the distinction was between the case where a person has actually received possession from another, who has no title, and the case where he has merely attorned by mistake to one who has no title; in the former case, the tenant cannot, unless under very special circumstances, dispute the title; in the latter he may, and for this position he cited *Rogers v. Pitcher*, 6 Taunt. 202. *Gravenor v. Woodhouse*, 1 Bing. 38.

(3) *Shep. Touch.* 254. *Cornish v. Searall*, 8 B. & C. 471. *Gravenor v. Woodhouse*, 1 Bing. 38. By Buller, J., in *Williams v. Bartholomew*, 1 B. & P. 326.

(4) *Rogers v. Pitcher*, 6 Taunt. 202. *Williams v. Bartholomew*, 1 B. & P. 326. *Gregory v. Doidge*, 3 Bing. 474. *Gravenor v. Woodhouse*, 1 Bing. 38.

tenant is not precluded from shewing, that his landlord's title is determined (1) either by act of law, or his own act, or by efflux of time.

Upon the same principle, it seems, a party accepting a negociable instrument is precluded from disputing the handwriting of the drawer; and although he may in general dispute the handwriting of the indorser, yet where the drawer is a fictitious person, the acceptor is bound to pay to the signature of the same person that signed for the drawer. (2)

When an agent, who is employed to receive money, and who is bound by his duty to his principal from time to time to communicate to him whether the money is received or not, renders

(1) England d. Syburn v. Slade, 4 T. R. 682. Doe d. Marriott v. Edwards, 5 B. & Ad. 1065. Doe d. Jackson v. Ramsbottom, 3 M. & S. 516. Doe v. Watson, 2 St. 230. Blake v. Foster, 8 T. R. 487. Brudenell v. Roberts, 2 Wils. 143. Hill v. Saunders, 2 Bing. 112. 4 B. & C. 529. As to the effect of payment of rent subsequently to the expiration of the landlord's title. Fenner v. Duplock, 2 Bing. 10. The tenant may shew payment of rent to a person having paramount title. Sapsford v. Fletcher, 4 T. R. 511. Taylor v. Zamira, 6 Taunt. 524. Dyer v. Bowley, 2 Bing. 94. Moss v. Gallimore, Doug. 279. Alchorne v. Gomme, 2 Bing. 54. With respect to payments of rent to mortgagees by tenants of mortgagors. Alchorne v. Gomme, 2 Bing. 54. Pope v. Biggs, 9 B. & C. 245. Keech v. Hall, Doug. 21. It would seem, that the expiration of the landlord's title, had been considered in some cases as not being a defence against the person by whom the tenant had been originally let into possession, unless the title had been formally renounced and a fresh holding commenced under another person. Balls v. Westwood, 2 Camp. 11. And see by Gibbs, C. J., in Rogers v. Pitcher, 6 Taunt. 209. But see

Fenner v. Duplock, 2 Bing. 10, and Neave v. Moss, 1 Bing. 360.

(2) Cooper v. Meyer, 10 B. & C. 468. Robinson v. Yarrow, 7 Taunt. 455. Wilkinson v. Lutwidge, 1 Str. 648. Smith v. Chester, 1 T. R. 654. Jenys v. Fawler, 2 Str. 946. Leach v. Buchanan, 4 Esp. 226. Price v. Neale, 3 Burr. 1354. Smith v. Mercer, 6 Taunt. 76, though the bill be forged. That the acceptance admits authority of agent purporting to draw as such. Porthouse v. Parker, 1 Camp. 82. Robinson v. Yarrow, 7 Taunt. 455. That it admits style of firm, Bass v. Clive, 4 M. & S. 13. And drawer's ability, Taylor v. Croker, 4 Esp. 187, cited 2 B. & C. 299, admits competency of drawer to indorse, Drayton v. Dale, 2 B. & C. 299. Concerning the admission of indorsements by acceptor or indorser, see further Hankey v. Wilson, Sayer, 223. Bosanquet v. Anderson, 6 Esp. 43. Sedford v. Chambers, 1 St. 326. Hemmings v. Robinson, Barnes, 436. Macpherson v. Thoytes, Peake, 20. Jones v. Radford, 1 Camp. 83. Carrick v. Vicary, Doug. 630. Duncan v. Scott, 1 Camp. 101. Lambert v. Oakes, 1 Lord Raym. 433. Critchlow v. Parry, 2 Camp. 182. Chaters v. Bell, 4 Esp. 210. Lambert v. Pack, 1 Salk. 127.

an account from time to time, which contains a statement that the money is received, he is bound by that account, unless he can shew that the statement was made unintentionally, or by mistake. (1)

**Wharfingers.**

It is an established rule, that where wharfingers acknowledge the title of a person for whom they hold property, it is considered as an attornment, and they are conclusively estopped from disputing such title, whatever may be the claim of a third person, at least, if they were fully acquainted with the nature of such claim, when they made the admissions. (2)

**Not conclusive.**

But in general, a person's conduct and language have not the effect of operating against him by way of estoppel. (3)

(1) *Shaw v. Picton*, 4 B. & C. 729. The cases respecting the effect of the receipt of premium, by the underwriter from the assured seem referrible to the principles under consideration, *Dalzel v. Mair*, 1 Camp. 532. A parish certificate is evidence for all the rest of the world, against the parish which granted it, and conclusive as to the parish to which it is directed, 4 T. R. 256. *Rex v. Headcome*, Burr. S. C. 253. A man is estopped by the recognizance of bail entered into for him by the name in which he is sued, from pleading a misnomer, although he is not a party to the recognizance, *Meredeth v. Hodges*, 2 N. R. 453. A tenant is concluded by the statement he makes to his landlord as to the time of entry, *Doe d. Eyre v. Lambley*, 2 Esp. 635. A person giving a wrong name previous to suing out of process, cannot, in an action against the sheriff, avail himself of the error in the name, *Price v. Harwood*, 3 Camp. 108. And see *Bass v. Clive*, 4 M. & S. 13. An owner of a ship giving a bill of lading by which freight appears to have been paid before a ship's departure from her landing port, is estopped against the assignee of such bill from claiming freight on the arrival of the vessel at her port of destination, *Howard v. Tucker*, 1 B. & Ad. 712.

(2) *Gosling v. Birnie*, 7 Bing. 345. The rule is laid down with the limitation in the text by *Alderson, J.* But the other Judges lay it down in a more unqualified way, See *Stonard v. Dunkin*, 2 Camp. 344. *Hawes v. Watson*, 2 B. & C. 541. *Dixon v. Hammond*, 5 B. & A. 310. *Ogle v. Atkinson*, 5 Taunt. 750. *Barton v. Boddington*, 1 C. & P. 207.

(3) Per *Chambre, J.*, in *Smith v. Taylor*, 1 N. R. 210. It has frequently happened, with regard to the evidence in some of the cases about to be examined, that the Judges have spoken of it as conclusive. But it would seem that in many instances, at least, they had reference to the effect of the evidence under the circumstances of some particular case, and it's probable weight with the jury. See *Alner v. George*, 1 Camp. 392. *Bristow v. Eastman*, 1 Esp. 172. The Courts are unwilling to extend the doctrine of estoppels, because it tends to prevent the investigation of truth, see by *Lord Kenyon*, in *Rex v. Labbenham*, 4 T. R. 254. *Wightw.* 67. 6 Esp. 20. 5 M. & S. 76. 10 East, 105. 3 T. R. 632. *Peake*, 91. 1 B. & P. 210. 2 N. R. 453. In *Combe v. Pitt*, Burr. 1590, it was held, that a man who had given money to another for his vote, should not be admitted to say that he had no vote. But it

Accordingly we have seen, that in the instances in which the party has assumed a particular character, or has recognised a particular character as belonging to another person, his conduct and language have, in general, not been deemed conclusive against him. (1)

It has been held, that a person is not concluded, as to the amount of his property, by an oath taken before commissioners under the property tax acts. (2) An insolvent's omission of a particular debt in his schedule, to which he was sworn, will not preclude him from afterwards recovering the debt. (3) An entry at the Custom House in the names of a firm is not conclusive, against the person making the entry, except as between him and the crown. (4)

A person who had given notice to his landlord that he had become bankrupt, in consequence of which his landlord accepted possession of the demised premises, is not estopped from disputing the fact of his bankruptcy, in an action brought by him against his assignees, the assignees not having been parties or persons to the transaction between himself and his landlord. (5) Nor would such a person be precluded from disputing his commission by surrendering, or by petitioning the Chancellor to enlarge the time for surrendering. (6)

With respect to the relative credit and weight of admissions which are not conclusive, it may be observed, that the admissions, which may be considered as having the greatest force, are those which are delivered on the oath of the party.

Admission on oath.

Thus answers in Chancery are very strong evidence, by way

is difficult to account for the principle of this ruling, as the moral delinquency of the briber is obviously irrelevant to the question of the effect of the evidence. A return under 1 & 2 Geo. 4, c. 87, of corn in the possession of a party as sold and delivered to B., does not preclude him from shewing that it was delivered to D. on account of

B., but that B. was not to have possession before payment, *Woodley v. Brown*, 2 Bing. 527.

(1) *Vide supra*.

(2) *Rex v. Clark*, 8 T. R. 220.

(3) *Hart v. Newman*, 3 Camp. 13.

(4) *Ellis v. Watson*, 2 St. 453.

(5) *Hearne v. Rogers*, 9 B. & C. 577.

(6) *Mercer v. Wise*, 3 Esp. 219.

of admission, in Courts of Law. (1) Where a bill was filed by the plaintiff as lessee of the dean and chapter of Carlisle, and the defendant offered in evidence an answer of the dean and chapter in a former suit, in which they admitted the existence of a modus, it was held to be not only admissible, but strong evidence to prove the modus; and an issue having been directed, Mr. Justice Bayley, at the trial, laid great stress upon the answer, as being cogent evidence against the defendant in the issue; observing that it was much stronger, than if it had been the answer of an individual. (2) A person's answer in Chancery is evidence against him by way of admission, in favour of a person who was no party to the Chancery suit; (3) for the statement being upon oath cannot be considered as conventional merely. A mere voluntary affidavit is evidence as an admission against the party who makes use of it. (4)

Admissions in  
deeds.

Admissions, by the deed of a party under seal, are entitled to great weight, on account of the deliberation implied by the nature of the instrument, if they do not even exclude any contrary statement. Between the parties to the deed, at least, they may be pleaded by way of estoppel, and though not so pleaded, would generally, as between such parties, have the effect of an estoppel. (5)

(1) B. N. P. 237. *Earl of Sussex v. Temple*, Lord Raym. 310. *Doe d. Digby v. Steel*, 3 Camp. 115, where the statement in the answer was as to *belief*. *Salter v. Turner*, 2 Camp. 87. 3 Camp. 401. *Lady Dartmouth v. Roberts*, 16 East, 334. *Rumney v. Beale*, Gwil. 1861. *Gully v. Bishop of Exeter*, 5 Bing. 171. *Grant v. Jackson*, Peake, 203, where an answer of a partner who had been joined as a defendant in a suit, but as to whom a *nolle prosequi* had been entered to a bill in Chancery filed by persons not parties to the record, was received, not as a judicial proceeding, but as a naked admission. See 5 Pr. 485. 12 Vin. Ab. 93. *Studdy v. Sanders*, 2 D. & R. 347, answer by two defendants to a bill of a third defendant,

charging them as partners.

(2) *De Whelpdale v. Milburn*, 5 Pr. 485.

(3) *Ashmore v. Hardy*, 7 C. & P. 505, and see *Grant v. Jackson*, Peake 203, *supra*, n. 1.

(4) *Style*, 446. *Sacheverell v. Sacheverell*, Bac. Ab. Ev. 628. *Vicary's case*, Bac. Ab. Ev. 623. Voluntary affidavit of joint covenantee, B. N. P. 238. *Cameron v. Lightfoot*, 2 Bl. Rep. 1191, that the making use of an affidavit, is an admission, which supersedes the necessity of proving that it has been sworn or signed, B. N. P. 238. *Rex v. James*, 1 Show. 97. *Johnson v. Ward*, 6 Esp. 47, affidavit of agent used by defendant for purpose of putting off a trial.

(5) See *Doe d. Pritchard v. Dodd*. 2 Nev. & M. 45. Com. Dig. Ev. B. 5,

It has been held, in an action of trespass against a sheriff for taking the property of the plaintiff, that the plaintiff may give in evidence a deed executed by the sheriff to a purchaser of the property, reciting the writ and the seisure and sale of the property under it, and that the deed so produced is *prima facie* evidence of the facts recited in it. (1)

It has been laid down,—apparently without sufficiently advert-  
ing to the circumstance of the deed being used by a party to it,  
or to the fact of it's being pleaded by way of estoppel or not,—  
that a party who executes a deed is precluded from saying,  
that the facts stated in the deed are not truly stated. (2) But  
it seems that a party to a deed may contradict it, in an action  
between himself and a stranger to it: if not pleaded by way of  
estoppel, as there is no mutuality, there can be no estoppel.

In a recent case, where a plea contained new matter of justifi-  
cation, upon which issue was joined, and a deed was given in  
evidence, the recital of which directly contradicted the new  
matter alleged in the plea, it was held nevertheless, that the  
defendant was not precluded from submitting matter of de-  
fence to the jury, and that the recital in the deed ought not to  
have been treated as conclusive upon the trial of the issue, the  
recital not having been pleaded by way of estoppel. (3)

Lainson v. Tremere, 1 Ad. & Ell. 792. Bowman v. Taylor, 2 Ad. & Ell. 278. Fort v. Clarke, 1 Russ. 604. The doctrine of Lord Coke, that a recital cannot operate by way of estoppel, Co. Litt. 352 b, seems no longer tenable. That a recital operates against those who claim under a party to a deed. Fitzgerald v. Eustace, Bac. Ab. Ev. 647. 2 P. Wms. 432.

(1) Woodward v. Larking, 3 Esp. 286. Mayor of Carlisle v. Blamire, 8 East, 493, name of a corporation. The recital of a lease in a release is evidence of the release. Ford v. Grey, 1 Salk. 286. The recital of an ancient charter in a modern charter is evidence, per Abbot, J., 5 M. & S. 78. Gervis v. Grand Western Canal Company. The recitals in a deed may confine the

effect of other admissions in the same document, as of the receipt of purchase money. Lampon v. Cooke, 5 B. & A. 607. Ford v. Lord Grey, 6 Mod. 44. Salk. 285. Cragg v. Norfolk, 2 Lev. 108. Fitzgerald v. Eustace, Gilb. L. Ev. 100. Hardr. 123. Date of lease is evidence of it's execution on same day, 1 Salk. 485. See further, Ingleby v. Smith, 10 Bing. 84. B. N. P. 298. Cossens v. Cossens, Willis, 25. Shelley v. Wright, Willis, 9. 2 Vent. 171. Marchioness of Annandale v. Harris, 2 P. Wms. 432. Burleigh v. Stibbs, 1 T. R. 465.

(2) By Bayley, J., in Baker v. Dewey, 1 B. & C. 707. And see Rowntree v. Jacob, 2 Taunt. 128. Lampon v. Cooke, 5 B. & A. 606.

(3) Bowman v. Rostron, 2 Ad. & El. 295.

Where a deed is used as an admission against a party to it by a person who is not a party, it seems material to consider that an admission of a fact, not made upon oath, may have been entered into between persons from various causes, besides that of a conviction of the truth of the facts contained in it. The evidence may have been of a conventional nature merely; and the only question seems to be, whether it is admissible at all as between a party to a deed and a stranger to it. (1)

Written admissions.

After admissions under oath and by deed, those next in order, with regard to credit and importance, are admissions by writing not under seal.

Receipt.

A receipt for money is an admission of great weight against a party, but not conclusive; and there is no legal objection to his shewing, if he can, that the money was not received, or that he gave the receipt under a misrepresentation. (2) An indorsement on a deed of the receipt of the sums of money, not being under seal, cannot amount to an estoppel, and is only evidence for a jury, capable of being rebutted by other circumstances

(1) *Supra*, p. 230. *Slaney v. Wade*, 1 Mylne & Craig, 338. *Fort v. Clarke*, 1 Russ. 604. *Rex v. Scamonden*, 3 T. R. 474. *Rex v. Laindon*, 8 T. R. 179.

(2) *Stratton v. Rustal*, 2 T. R. 366. *Benson v. Bennet*, 1 Camp. 394, n. *Attorney General v. Randall*, 2 Eq. Ca. Ab. cited and approved of, 2 T. R. 369. In *Alner v. George*, 1 Camp. 392, Lord Ellenborough says, there can be no doubt that a receipt in full, where the person who gave it was under no misapprehension, and can complain of no fraud or imposition, is binding upon him. And in *Bristow v. Eastman*, 1 Esp. 172, per Lord Kenyon, as between underwriter and insured, the acknowledgment of receipt of premium is conclusive. *Dalzel v. Main*, 1 Camp. 532. *De Gaminde v. Pigou*, 4 Taunt. 246. If a man give a receipt for the last rent, the former is presumed to be paid, *Gilb. Ev.* 142. A receipt on the back of a bill of exchange is *prima facie* evidence of payment by the acceptor, *Peake*, 25. The

giving a receipt does not exclude parol evidence of payment, *Rambert v. Cohen*, 4 Esp. 214. In *Lampon v. Cooke*, 5 B. & A. 609, the deed recited an agreement to pay, and afterwards stated that "in consideration of the purchase money being now so paid, as hereinbefore is mentioned," &c., and it was said that estoppels were odious *in the law*, and ought to be clearly made out, and that as the deed did not state an absolute payment, the payment might be disputed. It was said by Holroyd, J., in the same case, with reference to the receipt indorsed on the deed, that, not being under seal, it could not amount to an estoppel, but could only be evidence for the jury capable of being rebutted by the other circumstances of the case. It would seem that the observations of Lord Ellenborough, in *Alner v. George*, and of Lord Kenyon, in *Bristow v. Eastman*, as to the conclusiveness of receipts, must be intended as spoken with reference to their effect upon the minds of the jury.



in the case. (1) A receipt upon a negotiable instrument may be explained in the same manner as any other receipt. (2)

An adjustment on a policy, though *prima facie* evidence against a person signing it, does not bind him, unless there was a full disclosure of the circumstances of the case. (3) In cases of fraud, or where the underwriter is mistaken in the law or in a material fact, the adjustment has been held not to be conclusive. (4) An inventory, exhibited for the purpose of obtaining probate in the Ecclesiastical Court, seems not to be, in general, presumptive evidence of assets to the amount stated; (5) and probate stamp seems not to be *prima facie* evidence of the receipt of assets to the amount covered by the stamp. (6)

In *Bacon v. Chesney*, (7) it was held that it was competent to shew a mistake in an invoice, though it was in the same case

(1) *Skaife v. Jackson*, 2 B. & C. 421. By *Holroyd, J.*, 5 B. & A. 611. *Graves v. Key*, 3 B. & Ad. 318. It is otherwise, if the deed itself, or any other deed, state such receipt, for then the doctrine of estoppels may apply. *Rowntree v. Jacob*, 2 Taunt. 144. See *Lampon v. Cooke*, 5 B. & A. 609. *Baker v. Dewey*, 1 B. & C. 704. Co. Litt. 512.

(2) Per Cur. in *Graves v. Key*, 3 B. & Ad. 318. *Stratton v. Rastal*, 2 T. R. 366. *Wyat v. Marq. Hertford*, 3 East, 147. *Hearne v. Rogers*, 9 B. & C. 586. Lord Kenyon, in *Scholey v. Walsby*, 1 Peake, 34, was of opinion that a receipt on the back of a bill might be explained by parol evidence to be a receipt from the drawer, and not the acceptor. In *Fairmaner v. Budd*, 7 Bing. 574, a receipt, "received 10*l.* for a colt warranted sound," signed by an illiterate man, was held not conclusive of the contract.

(3) *Shepherd v. Chewther*, 1 Camp. 274. An adjustment and the striking out the name from a policy does not prove payment, *Adams v. Sanders*, 1 M. & M. 373. See *Rayner v. Hall*, 4 Taunt. 725.

(4) *Christain v. Coombe*, 2 Esp. 487. In the absence of invalidating circumstances, adjustments have been spoken of by the Judges, as conclusive; by which, it is conceived, is only meant, that such would be the natural effect of the evidence upon the minds of a jury.

(5) *Stearn v. Mills*, 4 B. & Ad. 657. It was held, in *Hickey v. Hayter*, 1 Esp. 313, that an inventory exhibited by an administrator was *prima facie* evidence of assets.

(6) Per Littledale and Parke, J., in *Stearn v. Mills*, 4 B. & Ad. 657, where it was said that *Foster v. Blakelock*, 5 B. & C. 328, had not been much considered as to this point. In *Mann v. Long*, 3 A. & E. 702, the probate was held to be admissible evidence in an issue of *plene administravit*, but it was considered as not being of itself *prima facie* evidence of assets actually come to the hands of the executors, though it might be of future assets, unless, perhaps, where there had been long acquiescence.

(7) *Bacon v. Chesney*, 1 St. 193. The mistake was in the time of credit allowed for payment.

considered, that if it had been delivered with the goods, or under a Judges' order, the party would have been bound by it.

**Bill delivered.** A bill delivered by an attorney to his client, for business done during a certain period, is strong presumptive evidence against any additional item within the same period; but the bill is not like a deed to operate as an estoppel, and the party will be at liberty to prove the fact of having transacted other business for the defendant. (1)

**Inscription.** The inscription on a stage coach, of the name of the party licensed to use it, is evidence against him of ownership, as well in an action as on summary proceedings. (2) It has been held, that where a defendant signed an admission of a debt, to enable an attorney to prove it under a commission of bankruptcy then subsisting against him, it was not an admission of the delivery of a signed bill, and did not dispense with the necessity of proof of the delivery of such a bill, in an action subsequently brought for the same claim; (3) because the bill might have been proved under the commission without being delivered. A parish certificate is conclusive upon the parish granting it, with respect to that parish to which it is granted, and *prima facie* evidence with respect to other parishes. (4) A paper written by a party is evidence against him by way of admission, although it is signed by another person. (5)

(1) *Loveridge v. Botham*, 1 Bos. & Pul. 49. It is there stated that an attorney's bill furnishes conclusive evidence against an increase of charge on any of the items contained in it. But there does not appear to be any ground for this distinction, except, perhaps, that possibly the client might be supposed aware of the omission of an item, but would naturally act in confidence, that the charges, of which he might not be an adequate judge, were correct. On the effect of a bill delivered by the plaintiff in support of a plea of abatement for non-joinder of parties, see 1 Stark. Ca. 296.

(2) *Barford v. Nelson*, 1 B. & Ad.

571, whatever is written by a party may be used as an admission against him, though it be not signed by him, 1 C. & P. 288.

(3) *Eicke v. Nokes*, 1 M. & M. 303.

(4) *Rex v. Lubbenham*, 4 T. R. 251. A certificate has been said to be mighty evidence as to other parishes; see by Buller, J., citing the words of Lord Holt. *ib.*

(5) *Alexander v. Brown*, 1 C. & P. 288. As to the effect of a signature as evidence of notice of the contents of a written instrument, *Harding v. Crethern*, 1 Esp. 57. *Vide infra*, as to signatures by prisoners of their examinations.

It was laid down by Lord Kenyon, that a bill in Chancery is not evidence of any fact contained in it, but was to be taken merely as the suggestion of counsel. (1) In the Banbury Peerage case, a question was proposed to the Judges, "whether any bill in Chancery can ever be received as evidence in a Court of Law, to prove any facts either alleged or denied in such bill as filed in Chancery:" to which the Judges answered that, "generally speaking, a bill in Chancery cannot be received as evidence in a Court of Law, to prove any fact either alleged or denied in such bill as filed. But whether any possible case may be put, which would form an exception to such general rule, they cannot undertake to say." (2) It will be observed, that the answer of the Judges does not pointedly negative the admissibility of a bill in Chancery when produced by way of an admission; and there are authorities in favour of such evidence being received. (3) It would seem, that the investigation of truth would be best promoted by receiving the evidence, subject to such observations as might be called for, in regard to the usual manner in which bills of Chancery are prepared.

With respect to verbal admissions, it may be observed, that they ought to be received with a great deal of caution. It may

Verbal admissions.

(1) *Doe d. Bowerman v. Sybourn*, 7 T. R. 3. The bill was offered in evidence by the lessor of the plaintiff, to prove an admission by the defendant; the allegations in the bill, which was filed by the defendant and another person, being inconsistent with the fact of a legal estate being in the person, in whom the defendant contended that it was vested.

(2) *Le Marchant's Gardiner peerage*, App. 413. 2 Selw. N. P. 714. And see *Ferrers v. Shirley*, Fitzg. 197. 1 Wightw. 325. *Woollett v. Roberts*, 1 Ch. Ca. 64. Two other questions were put to the Judges as to the admissibility of a bill in Chancery, and depositions under particular circumstances. The Judges held, that they were neither evidence of pedigree or of particular facts deposed to.

But, it would seem that the answers to these two latter questions were founded on the reasoning, that the declarations being *post litem motam*, could not be evidence in matters of pedigree, and that the statements in the bill, or depositions could not be evidence against a person not being party or privy to the proceedings; it may be doubted, how far the question, of a bill in Chancery being evidence by way of an admission, was under the consideration of the Judges, in the answer stated in the text.

(3) B. N. P. 235. *Snow v. Phillips*, 1 Sid. 221. *Taylor v. Cole*, 7 T. R. 3, n. Where a bill in Chancery was received as evidence of reputation in a case of pedigree, which perhaps is an authority *a fortiori*, Gilb. Ev. 49.

be a correct principle that the statement of a person to the prejudice of his own interest, when used against himself, is entitled to credit without the tests of the party being sworn or cross-examined. Still the repetition of oral statements is always subject to great imperfections. The party from whom they proceed may probably not have correctly expressed his meaning; this meaning, if correctly expressed, may have been misunderstood; a slight alteration of the words, without any design of intentional misrepresentation, may entirely vary the effect of his statement. (1)

Admissions by  
whom made.

Admissions must in all cases be brought home to the party in a suit, against whom they are used, or to some person who is identified in interest with him; and it is not a sufficient ground for receiving the admission, that it might have been used to the prejudice of the person from whom it proceeds. Thus, in an action of trover brought to recover the value of goods distrained, on the ground that the defendant was not the plaintiff's landlord, the plaintiff's case was, that he had paid rent to another person, and it was held, that the statement of that person respecting the receipt of rent was not evidence without calling him. (2)

Admissions by  
party.

Admissions are clearly evidence against a party to the record who has made them. But some questions have arisen as to what persons are to be deemed parties; the circumstance giving rise to these questions being, when one person is named a party on the record, who is only nominally a party, while another is the person really interested. On this subject, it has been held, that admissions are evidence in favor of the other side, whether made by a nominal party on the record, who sues as a trustee for the benefit of another, (3) or whether made by the party

(1) See by Mr. Justice J. Parke, note to *Earl v. Picken*, 5 C. & P. 542. Burr. 2057. 2 Wils. 399. Per Lord Ellenborough, 1 M. & S. 636. Per Alderson, B., *Rex v. Simons*, 6 C. & P. 540. On the effect of admissions in the Ecclesiastical Courts, per Lord Stowell, 1 Hagg. 304.

(2) *Spargo v. Brown*, 9 B. & C. 935. See *Bernasconi v. Farebrother*, 3 B. & Ad. 372, and by Holroyd, J., in *Barough v. White*, 4 B. & C. 325. And *vide infra*, *Secondary Evidence*.

(3) *Bauerman v. Radenius*, 7 T. R. 664. *Craib v. D'Aeth*, *ib.* 670, n., admission by obligee of an assigned

who is really interested in the suit, though not named on the record. (1) The following examples will illustrate the several parts of this rule.

In the case of *Bauerman and another v. Radenius*, (2) which was an action by the shippers of goods against the captain of a ship, for not delivering the goods in proper condition, a letter written by the plaintiffs was given in evidence on the part of the defendant, in which they entirely exculpated the defendant from all misconduct; and it appeared also from the letter, that the goods were shipped on the risk of third persons, and that the plaintiffs were not really interested in the suit: the counsel on the other side contended, that the parties really interested ought not to be concluded by the admission of the plaintiffs, who were merely nominal parties in the action: Lord Kenyon was of a different opinion, and the plaintiffs were nonsuited. The Court of King's Bench afterwards affirmed the nonsuit. Mr. Justice Lawrence, on that occasion said, "Van Dyck and Co., the persons on whose risk the goods were shipped, are in this difficulty; the present plaintiffs either have or have not an interest; but it must be considered that they have an interest, in order to support the action; and if they have, an admission made by them, that they have no cause of action, is admissible evidence. I have looked into the books, to see if I could find any case in which it has been holden, that an admission of a plaintiff on the record was not evidence, but have found none." (3)

By party suing for benefit of another.

bond. And this, notwithstanding the absence of any beneficial interest appearing, as in *Bauerman v. Radenius*, from the admission itself. B. N. P. 237, *contra*. Salk. 260. Where a nominal party gives a release, the Courts will sometimes order it to be delivered up. *Payne v. Rogers*, Doug. 391. 1 Chitt. 390. Tidd. 677.

(1) *Rex v. Hardwick*, 11 East, 578, 589. An attorney conducting a cause in Court may be called as a witness by the opposite side, and be asked who employs him, in order to shew the real party, and

so let in his declarations, *Levy v. Pope*, 1 M. & M. 410.

(2) 7 T. R. 664.

(3) In *Davis v. Ridge*, 3 Esp. 101, in an action against trustees for trust-money received, Lord Eldon refused to allow evidence of the admission of one of the trustees, of the receipt of trust-money. In *Tullock v. Dunn*, R. & M. 416, it was held, that a promise by one of several executors is not sufficient to take a case out of the statute of limitations. And see *Atkins v. Tredgold*, 2 B. & C. 28, that a payment by one of several *alieno jure*,

In *Almer v. George*, (1) it was held, that a receipt in full, given by the plaintiff on the record, could not be invalidated, by shewing that the plaintiff had assigned all his interest, and was a mere trustee, and that the receipt was fraudulently given.

By person interested, though not party to the record.

*Cestui que trust* of bond.

In an action of debt upon a bond conditioned to pay money to L. D., for whose benefit the action was brought, the defendant proved that L. D. had said, in a conversation respecting this bond, that the defendant owed nothing; upon which the jury found for the defendant. On a motion for a new trial, it was argued, that the declarations of L. D., who was not a party to the action, ought not to affect the plaintiff; but the Court said, that the case was to be considered as if L. D. was the plaintiff, the action being for L. D.'s benefit. (2)

Interested in policy.

An action upon a policy may be brought in the name of the person who effected it, though he be not the person interested; yet the persons interested are so far looked upon as parties to the suit, that the declarations of any of them are admissible in evidence against the plaintiff. (3)

Interested in freight.

In an action by the master of a ship for freight, the declara-

does not raise an *assumpsit* in all. In *Dowden v. Fowle*, 4 Camp. 38, an admission by one of several assignees of a bankrupt was received, in an action in which the assignees were the real parties. But the person making the admission was also petitioning creditor, and the admission related to his debt, see *Young v. Smith*, 1 Esp. 121.

(1) 1 Camp. 392. See *Gibson v. Winter*, 5 B. & Ad. 96. The proper remedy is by application to the equitable jurisdiction of the Court. By Lord Ellenborough, *ib.* *Legh v. Legh*, 1 B. & P. 447. *Payne v. Rogers*, Doug. 407. It seems questionable, whether the receipt might not have been disputed on another principle, by analogy to the cases in which it has been held, that a security given in fraud of third persons shall not be available

even as between the parties themselves, *Cockshot v. Bennet*, 2 T. R. 763. *Smith v. Bromley*, Doug. 671.

(2) *Hanson v. Parker*, 1 Wils. 257. *Kemble v. Farren*, 3 C. & P. 623, where it appeared that the agreement which was the subject of the suit, was made on behalf of the plaintiff and the other proprietors of a theatre, the declarations of the other proprietors were received. See *Davis v. Dinwoody*, 4 T. R. 678, where the Court looked into the relation of trustees and *cestui que trust*, for the purpose of disqualifying a witness on the ground of interest.

(3) By Lord Ellenborough, in *Bell v. Ansley*, 16 East, 143. See also the case of *Duke v. Aldridge*, cited by Counsel in *Baerman v. Rade-*

tions of the owner of the ship are admissible against the plaintiff, as the action is brought for the owner's benefit. (1)

With respect to admissions by rated parishioners, it seems that upon an appeal against an order of removal, the declarations of a rated inhabitant of the appellant parish are evidence against that parish, without calling the inhabitant, and shewing that he refused to be examined. (2)

Rated  
parishioners.

nius, 7 T. R. 665, and Bell v. Smith, 5 B. & C. 188.

(1) Smith v. Lyon, 3 Camp. 465. See Robson v. Andrade, 1 St. Ca. 372. Harrison v. Vallance, 1 Bing. 45, where the defendant had admitted that he had detained the deed for the detention of which the action was brought, at the request of the person whose declarations were received, and who was substantially interested in the detention of it. Mr. Justice Bayley, in Spargo v. Brown, 9 B. & C. 938, says, that the parties in Harrison v. Vallance, were identified. The case of Hart v. Horn, 2 Camp. 92, seems opposed to the preceding cases, where, in replevin, the declarations of the person under whom the defendant made cognizance were held not to be admissible for the plaintiff. It did not appear that the person making cognizance was indemnified. But in Hancock v. Welsh, 1 St. Ca. 347, in an action of assumpsit, by A. B., against the assignees of a bankrupt for rent due from them as tenants, a verdict against the assignees in a replevin suit brought by the assignees against the bailiff of A. B., and in which the bailiff made cognizance, was held to be admissible for A. B. in the action of assumpsit; the issue found upon the cognizance being that the assignees were tenants of A. B. *Vide supra*, p. 95, as to the incompetency of witnesses on the ground of being substantially parties. For other cases see 1 Wils. 257. 11 East, 578. 1 Bing. 45. 1 Stark. 372. Lord Raym. 190. 4 Camp. 38. 6 Esp. 121. 16 East, 143. 1 Esp.

390. 11 East, 584, n. Duke v. Aldridge, cited 7 T. R. 665. 1 Ventr. 350. 1 Esp. 395.

(2) Rex v. Whitley Lower, 1 M. & S. 636. In Rex v. Hardwick, 11 East, 578, the party had refused to be examined. Rex v. Wobourn, 10 East, 395, 402. Before the 54 Geo. 3, c. 170, the admissions of rated parishioners were received on account of their being parties to the suit, and it would seem that the statute which renders parishioners competent witnesses, does not interfere with the rule of evidence respecting admissions. The power of calling the inhabitant, even if he be compellable to become a witness, may often not compensate for the loss of his admission. With respect to admissions by individual members of a corporation; in an action by the Trustees of Ancient Britons v. Spurrier, Sitt. after Easter Term, 1822, K. B. In an action of assumpsit for money had and received; defendant was employed to fetch a sum from the bank of the society—10% of it was missing, a witness was allowed to state what a member of the society had said the night afterwards; though the society consisted of six hundred members; and the evidence was stated to be admitted on the same ground that the admissions of rated parishioners were received. In a previous case of the Corporation of London v. Long, 1 Camp. 22, where the question related to the powers of a city officer, Lord Ellenborough held, that the declarations of an indifferent individual of the Corporation were not admissible, but that he would admit what

Party indemnifying.

A creditor who has indemnified a sheriff, for making a seizure under a writ of execution, is considered as substantially the defendant, in an action brought against the sheriff on account of the seizure; (1) on the ground, that the sheriff, by his conduct, substitutes himself for the original defendant. (2)

Petitioning creditor.

But in a late case it was held, that the declarations of a deceased petitioning creditor, made after the commission, are not evidence against the assignees, in an issue to try whether the commission was concerted between the petitioning creditor, the bankrupt, and the attorney: (3) the petitioning creditor, it was said, could not be taken to be the real party interested in the cause; and the result of the trial, if the verdict were for the plaintiff, would not necessarily be the superseding of the commission, the issue being merely a proceeding to satisfy the Chancellor's conscience.

Issue on liability of stranger.

Evidence of admissions, made by strangers to a suit, are sometimes received in evidence, where the question in the suit is, whether a particular claim might have been enforced as against those strangers. Thus it has been held, that on a plea in abatement for the non-joinder of A. B. as a

the officer himself had been heard to say upon the subject. *Mayor of London v. Joliffe*, 2 Keb. 295. *Lord Dorset v. Carter*, 3 Keb. 300. *Rex v. City of London*, 1 Vent. 351. 2 Lev. 231. 1 Vent. 254. 2 Vern. 351. 11 East, 584, n. 7 T. R. 665. *Vide supra*, p. 94, on the incompetency of rated parishioners as witnesses on the ground of their being parties. *Weller v. Governors of Found. Hosp. Peake*, 153. 2 Lev. 231. 1 Vern. 254. B. N. P. 290. 5 T. R. 174, competency of freemen of corporation. *Doe v. Tooth*, 3 Y. & J. 19. *Simons v. Smith*, R. & M. 29, co-partner. *Whitmore v. Wilks*, 1 M. & M. 214, trustee suing by treasurer. *Fenn v. Granger*, 3 Camp. 178, one of two lessors in ejectment.

(1) *Dyke v. Aldridge*, cited 7 T. R. 665, see *Dowden v. Fowle*, 4 Camp. 38. *Young v. Smith*, 6 Esp. 121.

(2) Per *Richardson, J.*, 3 B. & B. 136. The circumstance that a person indemnifies a party to the record, does not seem in all cases sufficient to let in his admissions, *Drake v. Sykes*, 7 T. R. 117. That an admission which would be evidence against the party is evidence against the sheriff, *Gibbon v. Coggan*, 2 Camp. 188. *Slomon v. Herne*, 2 Esp. 695. *Williams v. Bridges*, 2 St. 42.

(3) *Harwood v. Keys*, 1 M. & R. 204. It was suggested by *Patteson, J.*, that in *Young v. Smith*, 6 Esp. 121, which was loosely reported, the declarations must have been made before the commission, and that in *Dowden v. Fowle*, 4 Camp. 38, the fact of the petitioning creditor having indemnified the sheriff was the principle of the decision. The assignees gave the instructions for the defence.



defendant, his declarations before action brought were evidence in support of the plea; (1) on the ground, that whatever would be evidence in an action brought against him to prove him liable, might be received to prove his liability on this issue. Apparently, on the same principle, the admissions of bankrupts, or entries in their books, made before the act of bankruptcy, are receivable in evidence, to prove the petitioning creditor's debt. (2) And the admission of a petitioning creditor, made before the commission, as to the amount of his debt, is, on a similar ground, receivable in evidence against the assignees of a bankrupt. (3) In cases of this description the issue appears to be, what were the mutual rights of two persons, (one or both being strangers to the suit,) at a particular period; which inquiry would seem to let in such evidence as

(1) *Clay v. Langslow*, 1 M. & M. 45.

(2) *Watts v. Thorpe*, 1 Camp. 376, entry in books. *Hoare v. Coryton*, 4 Taunt. 560, a signed account. *Taylor v. Kinloch*, 1 St. 176. *Ewer v. Preston*, Rep. temp. Hard. 378, see *Evans v. Lake*, B. N. P. 282. In *Parker v. Barker*, 1 Br. & B. 9, a bankrupt's admissions that he was in partnership with a trader, were received as proof of the trading. But the propriety of this decision was doubted in *Bromley v. King*, R. & M. 228. It may be observed, that in an action by assignees, the question as to the petitioning creditor's debt is, whether it could have been enforced against the bankrupt, which point the admission clearly establishes. The bankrupt's declarations before the act of bankruptcy may be used against the assignees to shew collusion as part of the *res geste*. *Thompson v. Bridges*, 8 Taunt. 336. After the bankruptcy, though before the commission or fiat, the admissions of the bankrupt are, it seems, not receivable. *Smallcombe v. Bruges*, 13 Pr. 136. *Taylor v. Kinloch*, 1 St. 176. *Sanderson v. Laforest*, 1 C. & P. 46. Though a bankrupt's

declaration, that a bill would not be paid, has been admitted to supply proof of notice, where the admission was made after bankruptcy and before the issuing of the commission. *Brett v. Levett*, 13 E. 213, cited in *Taylor v. Kinloch*, 1 Stark. Ca. 176. But at the period of that decision, as it would seem from the case of *Dowton v. Cross*, 1 Esp. 168, there cited, a bankrupt's declarations, were admitted to prove the petitioning creditor's debt, if made at any time before the commission issued. See *Schooling v. Lee*, 3 St. 151. *Marsh v. Meager*, 3 St. 353. *Bernasconi v. Farebrother*, 3 B. & Ad. 372. An admission made after an act of bankruptcy, is evidence against the bankrupt himself in an action brought by him against an assignee, to try the validity of the commission, *Jarrat v. Leonard*, 2 M. & S. 265.

(3) *Smith v. Young*, 6 Esp. 121. Of this case, Mr. Justice Patteson, in *Harwood v. Keys*, 1 M. & Rob. 205, observed, that it was loosely stated, and that he could not but think that the declarations must have been made before the commission.

would have been receivable between those persons. In the last example, however, it is not clear, that the decision did not turn on the point, that the assignees were liable to be affected by admissions of the petitioning creditor, because he was a privy in estate.

Admission by  
party in dif-  
ferent capacity.

An admission may have been made by a party to a record, when in a different capacity from that in which he is concerned as regards the suit; and it seems to have been considered, in such a case, that his former admission ought not to be evidence against him. For the change which has taken place in his interest, his means of knowledge, and his powers of acting, shew that his former admission is not a safe criterion of the truth of the claim or defence, which he is at present setting up. And the injustice of allowing his former admission to be used against him may appear to be the greater, where by the change of his situation he has become the representative of the interest of others, with whom in his former situation he had no privity.

Thus it has been held, that the declarations of a person, made before he became assignee of a bankrupt, are not evidence against him, when suing as such assignee. (1) And the declarations of a *prochein ami*, made before action brought, are not admissible for the defendant. (2)

By other  
party to the  
suit.

It appears to be a general principle, that, in a civil suit by or against several persons, who are proved to have a joint interest in the decision, a declaration made by one of those persons, concerning a material fact within his knowledge, is evidence against him, and against all who are parties with him in the

(1) Fenwick v. Thornton, 1 M. & M. 51.

(2) Webb v. Smith, R. & M. 106. This rule is illustrated by the doctrine of estoppels. Thus, a woman is not estopped, after coverture, by an admission upon record by her husband and herself during coverture. An heir claiming as heir of his father is not estopped

by an estoppel upon him as heir to his mother. A party suing as executor, in an action of debt upon a bond, is not estopped, by having been barred by an action on the same bond when he sued as administrator. Robinson's case, 5 Co. 32 b. Com. Dig. Estoppel, C. Wrottesly v. Bendert, 3 P. W. 237. Barron v. Grellard, 3 V. & B. 166.

suit. (1) In an action of covenant against two defendants, the affidavit of one of them was held to be evidence against both. (2) But unless there be a joint interest in the decision, the admission of one defendant will not be receivable against a co-defendant. (3) In actions of tort, the admission of one co-defendant will not affect another co-defendant. (4) The rule is clear against the reception of such evidence, in the case of persons jointly indicted. (5)

In an action against persons as partners, the partnership being first proved, an admission by one of the defendants is admissible against all. (6) Thus, in an action by several partners against the defendant for the non-performance of an agreement, a declaration by one of the partners suing, that the goods, to which the agreement related, were his separate property, is evidence against all the plaintiffs suing as upon a joint contract. (7) An admission by one defendant, of his partnership with the co-defendants, who were sued with him as acceptors of a bill of exchange, and who had been outlawed, has been received as proof against him of a joint promise by all. (8)

By partner  
party to suit.

The rule with regard to the admissions of partners is not confined to cases, where they are parties to the same suit. The admission of a partner, though not a party to a suit, is evidence against another partner, who is sued as to joint contracts during the partnership; and this, whether the admission be made before the determination of the partnership or

By partner  
not a party.

(1) 11 East, 589.

(2) Vicary's case, Gilb. Ev. 51.

(3) This has been held with respect to the answers of co-defendants, on the ground, that if it were allowed, a plaintiff might make one of his friends a defendant. Wych v. Meale, 3 P. Wms. 311. 12 Ves. 361.

(4) The lax expressions of Lord Ellenborough, in Rex v. Hardwick, 11 East, 585, are qualified by Chief Justice Tindal, in Daniells v. Pot-

ter, 1 M. & M. 502. *Vide supra*, p. 215.

(5) By Lord Kenyon, in Grant v. Jackson, Peake, 204. *Vide infra*, confessions. And *supra*, 91, as to declarations part of the *res gestæ*.

(6) Nicholls v. Dowding and Kemp, 1 Starkie, N. P. C. 81. Grant v. Jackson, Peake, 204.

(7) Lucas and others v. De la Cour, 1 Maule & Selw. 249.

(8) Sangster v. Mazarredo and others, 1 Starkie, N. P. C. 161.

afterwards. (1) But the statement of one, who has been admitted into partnership subsequently to the transaction in question, is clearly not admissible in evidence as to such antecedent transaction. (2) An admission by a part owner of a ship, upon a subject of co-partnership, is not evidence against another part-owner. (3)

Part-owner.

Parties to instrument.

In *Whitcomb v. Whiting*, (4) which was an action on a joint and several promissory note, given by the defendant and others, to which action the defendant pleaded the general issue and the statute of the limitations, the Court of King's Bench determined, that proof of payment of interest and part of the principal within six years, by one of the others, who was not sued, would take the case out of the statute. Lord Mansfield said, "payment by one is payment by all, the one acting virtually as agent for the rest; and in the same manner an admission by one is an admission by all." Different opinions have been expressed respecting the propriety of the decision in this case: but the doctrine contained in it appears to be now clearly established, though it is only an authority for cases, where the admissions are made by a party originally liable upon the instrument. (5)

(1) *Wood v. Braddock*, 1 Taunt. 104. In *Graul v. Jackson, Peake*, 203, the answer of a partner against whom a *nolle prosequi* had been entered was received as an admission against his co-partners. And see *Thwaites v. Richardson, Peake*, 16, where Lord Kenyon thought that the admission of a party not a partner to the suit was not receivable in evidence. *Pelerick v. Turner*, cited 1 Taunt. 104. *Hoddenpyl v. Vingerhood, Chitty on Bills*, 361, admission of an acceptance by a partner. *Henderson v. Wild*, 2 Camp. 562, fraudulent receipts of a partner. And see, *Booth v. Jaunce*, 7 Price, 198. *Holme v. Green*, 1 St. 488. *Ellis v. Watson*, 2 St. 453. 1 Esp. 29. 2 Esp. 608. *Bust v. Palmer*, 5 Esp. 145. *Sangster v. Marraredo*, 1 St. 161, admission by partner of partnership.

(2) *Catt v. Howard*, 3 Stark. C. 5. *Pritchard v. Draper*, 1 Russ. & Myl. 191, admission after the dissolution of partnership to prove payments made after such dissolution.

(3) *Jaggers v. Binnings*, 1 Stark. C. 64.

(4) 2 Dougl. 661.

(5) In *Parham v. Raynal*, 2 Bing. 306, where the admission was used against a surety, *Whitcomb v. Whiting* was confirmed. In *Burleigh v. Stott*, 8 B. & C. 41, *Whitcomb v. Whiting*, and *Jackson v. Fairbank* were confirmed, and see *Chippindale v. Thurston, M. & M.* 411. In the previous case of *Atkins v. Tredgold*, 2 B. & C. 29, it was doubted, and was held at all events not to apply to persons liable *alieno jure*, and see *Rullock v. Dunn, R. & M.* 416. *Brandram v. Wharton*, 1 B. & A. 470, where

We proceed next to consider the subject of admissions by agents. Such admissions appear to be liable to greater objections, than the admissions of the parties themselves. Chief Justice Tindal has observed, (1) "It is dangerous to open the door to declarations of agents, beyond what the cases have already done. The declaration itself is evidence against the principal, though not given on oath; it is made in his absence, when he has no opportunity to dispute or correct it by any observation or by any question put to the agent, and it is frequently brought before the Court and jury after a long interval of time. It is liable therefore to suspicion originally, from carelessness or misapprehension in the original bearer; and to still further suspicion from the faithlessness of memory in the reporter, and from the facility with which he may give an untrue account. Evidence therefore of such a nature ought always to be kept within the strictest rules, to which the cases have confined it." There is less necessity for resorting to such evidence in the case of living agents, than where proof is given of the admissions of parties, who may refuse to be examined; and perhaps the admissions of agents may be considered not so likely, as those of the parties, to contain an accurate and complete statement of circumstances.

Numerous questions have arisen respecting the point, how

the acknowledgment was not express, and where *Jackson v. Fairbank*, 2 H. B. 340, was doubted, on the ground that the admission was not made by a person liable to contribute, see *Pittam v. Foster*, 1 B. & C. 248. In *Gray v. Palmer*, 1 Esp. 135, it was held, that where the plaintiff declared against several defendants on a joint and several note, and the defendants severed in their pleas, and one of them by his plea admitted the handwriting of the note, the handwriting must nevertheless be proved against the other defendants. But this case was apparently decided on the ground, that an admission in one plea cannot be used to disprove another plea. After the death of one maker of a joint

and several promissory note signed by two, a payment upon it by the executor of the deceased party will not take the debt out of the statute as against the survivor, *Slater v. Lawson*, 1 B. & Ad. 396. See 9 Geo. 4, c. 14, as to new promises by joint contractors, executors, or administrators. *Halliday v. Ward*, 3 Camp. 32. *Mantstephen v. Brooke*, 3 B. & A. 141. *Clarke v. Hougham*, 2 B. & C. 149. *Holme v. Green*, 1 St. C. 488. In *Maunderra v. Reeve*, 2 St. Ev. 484, n., payments made by a joint maker of a note, who had suffered judgment by default, were held to take a case out of the statute, on the authority of *Burleigh v. Scott*, *supra*.

(1) In *Garth v. Howard*, 8 Bing. 453.

far the admissions of agents may affect their principals. The statement or representation of an agent, at the time of a transaction which is within the scope of his authority, is evidence against the principal himself, in consequence of the legal relation between principal and agent. It is in the nature of original evidence and not of hearsay, the representation or statement of the agent in such cases being the ultimate fact to be proved, and not an admission of some other fact. Thus, what an agent says at the time of a sale, which he is employed to make, is evidence as part of the transaction of selling; and in order to prove what was said, it cannot be necessary, that the agent himself should be called. But where an agent has said or written any thing relative to a transaction which is past and completed, the question of the admissibility of the agent's declaration, without calling the agent, depends on the point whether the making of such a statement was within the scope of the agent's authority. (1)

Authority to admit, not inferred from agency alone.

Notwithstanding some vacillation of the law upon this subject, (2) it appears to be now settled, that an authority to make an admission is not necessarily to be implied from an authority previously given in respect of the matter, to which the admis-

(1) See the judgment of Sir W. Grant, Master of the Rolls, in *Fairlie v. Hastings*, 10 Ves. 127. *Kahl v. Johnson*, 4 Taunt. 565. *Langhorn v. Allnut*, 4 Taunt. 511. *Helyar v. Hawke*, 5 Esp. 74. *Betham v. Bonson Gow*, 45. *Alexander v. Gibson*, 2 Camp. 555. *Irving v. Motley*, 7 Bing. 553. *Peyton v. Governors of St. Thomas's Hospital*, 9 B. & C. 725. *Prideaux v. Collier*, 2 Stark. C. 57. *Drake v. Marryat*, 1 B. & C. 473. *Peto v. Hague*, 5 Esp. 134. *Shumack v. Lock*, 10 B. Moore, 39. *Powell v. Hodgetts*, 2 C. & P. 432. Declarations of an agent employed to imprison another. *Peyton v. Governors of St. Thomas's Hospital*, admission by surveyor of corporation, 3 C. & P. 363. *Irving v. Motley*, 7 Bing. 550. *Hazard v. Treadwell*, 1 Str. 506. *Shumack v. Lock*, 10

B. Moore, 39. In *Coates v. Bainbridge*, 5 Bing. 58, the letters of the agent were received, because adopted by the answers of the principal.

(2) See *Biggs v. Lawrence*, 3 T. R. 454, where it was held, that if A. ordered goods of B. to be delivered to C., an acknowledgment of the receipt by C. was evidence against A.; it was so held at *miss primis*, by Buller, J. The case was afterwards decided upon a different ground, the illegality of the contract. The marginal note in 3 T. R. is incorrect, for the agent was not employed to buy goods. As to which, see observations of counsel in *Bauerman v. Radenius*, 7 T. R. 665, and by Lord Kenyon, quoted in 10 Ves. 128. *Doug. 751*. *Evans v. Beattie*, 5 Esp. 26. *Bacon v. Chesney*, 1 St. C. 192.

sion relates. Thus, in *Fairlie v. Hastings*, (1) where the fact sought to be established was, that a bond had been executed by the defendant to the plaintiff, which the defendant had got possession of, the Master of the Rolls refused to admit, as evidence of this fact, the declaration of the defendant's agent, who had been employed to keep the bond for the plaintiff's benefit, and who, on it's being demanded by the plaintiff, informed him that it had been delivered to the defendant. The declaration of a servant employed to sell a horse is evidence to charge the master with a warranty, if made at the time of sale; but the servant's admission of a warranty, made at any other time, is not receivable. (2)

In *Garth v. Howard*, (3) it was held, that under the circumstances of the case, the declarations of a pawnbroker's shopman were not admissible against his employer. It was said by Chief Justice Tindal, that if the transaction, out of which the suit arose, had been one in the ordinary trade or business of the pawnbroker, a declaration of the shopman, that his master had received goods, might probably have been evidence against the master, as it might be held within the scope of such agent's authority to give an answer to such an inquiry, made by any person interested in the goods deposited with the pawnbroker. But the transaction appeared to have been a transaction unconnected with the business of the shop, and there was no evidence to shew the agency of the shopman in such transactions.

In the case of *Maesters v. Abraham*, (4) Lord Kenyon, C. J., refused to admit an agent's letter as evidence of an

(1) 10 Ves. 128. This is referred to by Tindal, C. J., in *Garth v. Howard*, 8 Bing. 452, as being the leading case on the subject. The Master of the Rolls there lays down the rule respecting the statements of agents to be, that they are inadmissible, unless made by them either at the time of their making an agreement about which they are employed, or in acting within the scope of their authority.

But it seems to be a more simple rule with respect to admissions that they are only receivable when there is an authority to make them. *Garth v. Howard*, 8 Bing. 452. *Maesters v. Abraham*, 1 Esp. 375. *Helyar v. Hawke*, 5 Esp. 74.

(2) *Helyar v. Hawke*, 5 Esp. 72. See *Peto v. Hague*, 5 Esp. 134.

(3) 8 Bing. 451, see *Shumack v. Lock*, 10 B. Moore, 39.

(4) 1 Esp. N. P. C. 375.

agreement against the principal, holding, that the agent himself ought to be examined. "If the agreement," said the Master of the Rolls, (1) adverting to this case, "was contained in the letter, I should have thought it sufficient to prove that the letter was written by the agent: but if the letter was offered as proof of the contents of a pre-existing agreement, then it was properly rejected." And the Court of Common Pleas has determined, after much argument, in the cases of *Kahl v. Janson*, (2) and *Langhorn v. Allnut*, (3) that the letters of an agent abroad to his principal, containing a narrative of the transaction in which he had been employed, were not admissible in evidence against the principal, as the mere representation of the agent. The general rule on the subject was there fully recognised and confirmed. "When it is proved," said Mr. Justice Gibbs, that A. is agent to B., whatever A. does, or says, or writes, in the making of a contract as agent of B., is admissible in evidence, because it is part of the contract, which he makes for B., and which therefore binds him, but it is not admissible as the agent's account of what passed." (4) When the declarations of an agent are admitted in evidence, they are received not for the purpose of establishing the truth of the fact stated, but as representations, by which the principal is as much bound as if he had made them himself, and which are equally binding whether the fact stated be true or false.

Express and  
implied author-  
ity.

But an agent's admission will be binding on his principal, where the making of the admission is within the scope of the agent's authority; and the authority of an agent to make admissions may be either express, or implied from circumstances. (5)

(1) 10 Ves. 127.

(2) 4 Taunt. 565.

(3) 4 Taunt. 511. *Reyner v. Pearson*, 4 Taunt. 663. S. P.

(4) 4 Taunt. 519, where an agent's letters were adopted and acted on by his principal, that circumstance was considered as shewing that the letters were acts within the scope of the agent's authority, *Coates v. Bainbridge*, 5 Bing. 62. It would seem that the letters were connected with and necessary

to the explanation of the defendant's own letters.

(5) Many of the cases respecting what is sufficient proof of agency, whether they be cases of express delegation, the recognition of former acts, course of business, or relative situation of the parties, will be found useful upon the question what is sufficient authority in an agent to make admissions. See particularly the cases respecting proof of a ge-



Thus if one party refers another on a disputed fact to a third person as authorized to answer for him, (1) or employs an agent to make certain propositions respecting a transaction between himself and another, (2) he is bound by what his agent says or does within the scope of his authority, as much as if it had been done or said by himself. For example, in an action for goods sold and delivered, where it appeared at the trial, that in a conversation between the plaintiff and defendant, the former asserted that he had delivered the goods by one C., and the defendant replied, "If C. will say, he did deliver the goods, I will pay for them," the plaintiff was allowed to give in evidence C.'s answer respecting the matter referred to him. (3)

In the case of *Fabrigas v. Mostyn*, a point arose, which may serve as another example to illustrate the rule here laid

neral authority, inferred from recognition of an agent's acts in former instances. *Neal v. Irving*, 1 Esp. 61. *Watkins v. Vince*, 2 St. C. 368. *Prescott v. Flinn*, 9 Bing. 19. *Paley on Principal and Agent*, 201. *Courteen v. Touse*, 1 Camp. 43, n. *Whitehead v. Tucket*, 15 East, 400. *Doe v. E. L. W. W. Co., M. & M.* 149. *Tyler v. Duke of Leeds*, 2 St. C. 218. *Fenn v. Harrison*, 3 T. R. 75. *Betham v. Benson*, Gow. 45. *Coates v. Bainbridge*, 5 Bing. 58. *Evans v. Beattie*, 5 Esp. 26. *Bacon v. Chesney*, 1 St. 192. *Shumack v. Locke*, 10 B. Moore, 39. *Garth v. Howard*, 5 C. & P. 346. *Stevens v. Thatcher*, Peake, 187. 1 D. & R. 48. *Cooke v. Maxwell*, 2 St. 186. *Harding v. Carter*, Park, Insur. 4. *Rex v. Almon*, 5 Burr. 2686. *Hazard v. Treadwell*, 1 Str. 506. *Johnson v. Ward*, 6 Esp. 48. *Watkins v. Vince*, 2 St. 368. As to proof of a written power, see *Johnson v. Mason*, 1 Esp. 38. *Coore v. Callaway*, *ib.* 115. *Steglitz v. Egginton*, Holt, 141. *Houghton v. Ewbank*, 4 C. 88. A person once proved to be an agent is presumed to continue in that capacity, *Roberts v. Lady*

*Gresley*, 3 C. & P. 381. Particular examples of admissions by agents; *Richardson v. Anderson*, 1 Camp. 43, n., an agent who has authority to subscribe a policy, has authority to sign an adjustment. *Peyton v. Governor of St. Thomas's Hospital*, the admission of a surveyor to a corporation. *Foot v. Hayne*, 1 C. & P. 547, the plaintiff knew that her father was making representations to the defendant concerning her; it was held that his letters were evidence against her, though she was not answerable for particular expressions.

(1) *Daniell v. Pitt*, 1 Camp. 366. *Lloyd v. Willan*, 1 Esp. N. P. C. 178.

(2) *Gainsford v. Grammar*, 2 Campb. 9.

(3) *Daniell v. Pitt*, 1 Campb. 366. 6 Esp. N. P. C. 74. *S. C. Williams v. Innes*, 1 Campb. 364. *Price v. Hollis*, 1 M. & S. 105. *Brock v. Kent*, *ib.* n. 366. *Burt v. Palmer*, 5 Esp. N. P. C. 145. *Garnet v. Ball*, 3 Stark. N. P. C. 160. *Bretton v. Prettiman*, Sir T. Raym. 153. *Brayne v. Veale*, 3 Lev. 241. *Hood v. Reeve*, 3 C. & P. 284. *Godb.* 291. 21 H. 6. fol. 31, pl. 17. 3 Camp. 366. 1 Esp. 178.

down. (1) There a witness, who had been employed by the defendant to convey certain proposals to the plaintiff, explained them to him by an interpreter, from whom also he received the answer: the question was, whether the words of the interpreter could be given in evidence by the witness, as the answer of the plaintiff: or whether the interpreter himself ought to be called, as the witness understood neither the questions put to the plaintiff, nor the answer made by him. But Mr. Justice Gould ruled, that the evidence of the witness was clearly admissible, and sufficient. Here the interpreter was the accredited agent of the parties, acting within the scope of his authority, and in the execution of his agency.

Jury.

In a case where it was proved, that the defendant had said that if another jury were called, and they should find a particular fact, he would pay a sum of money, it was held that this finding of the jury, coupled with the declaration, was evidence against the defendant, upon the principle of the authorities, which make the declarations of persons referred to equivalent to their own admissions; for the jury were to be considered in the nature of accredited agents. (2)

Implied authority.

The admissions of an under-sheriff are not admissible in evidence against the sheriff, unless they tend to charge himself where he is the real party in the cause; as, in an action for an escape. In an action against the sheriff for taking illegal poundage, declarations of the under-sheriff, after he was out of office, were held not to be admissible to prove, that the bailiff, charged with having committed the extortion, was the sheriff's authorized agent. (3) Where, indeed, the declarations of the

(1) 11 St. Tr. 171.

(2) *Sybray v. White*, 1 M. & Wel. 441. It does not appear to have been necessary to determine in the cases above mentioned, whether the party making the reference would have been concluded by the result. In *Lloyd v. Willan*, 1 Esp. 178, the evidence appears to have been thought conclusive.

In *Garnet v. Ball*, 3 St. 160, it was said, that to make such evidence conclusive, it ought to be very clear. See *Whitehead v. Tattersall*, 1 Ad. & E. 491. *Stevens v. Thacker, Peake*, 187. *Doe d. Morris v. Rosser*, 3 East, 15. *Hurter v. Rice*, 15 East, 100.

(3) *Snowball v. Goodricke*, 4 B. & Ad. 541. The decision impugns

under-sheriff accompany official acts, they are in the nature of original evidence ; (1) though the admissions of a bailiff or sheriff's officer, where the authority is limited to the particular duties specified in his warrant, are not evidence against the sheriff. (2) What a bailiff says whilst he has a party in custody, (3) concerning the circumstances of the arrest may be admissible against the sheriff as part of the act for which he is responsible. And it has been held, that the relation of sheriff and officer continues whilst the writ is in course of execution, and therefore that the sheriff may be affected by the officer's declarations after the return of a *feri facias*, and before a warrant is made for sale, so long as the goods are in the hands of the officer. (4) In such cases the declarations of the officer are properly original evidence, and not in the nature of hearsay or admission.

Though a husband will not in general be bound by any admissions made by his wife, even where he is suing in *jure uxoris*, (5)

the general doctrine of Lord Kenyon in *Drake v. Sykes*, as to the sheriff being identified with the under-sheriff to all intents.

(1) *Yabsley v. Doble*, 1 Lord Raym. 190. *Drake v. Sykes*, 7 T. R. 117. *Kempland v. Macauley, Peake*, 65, where it was considered that the circumstance of the bailiff giving a bond of indemnity which was relied on in *Yabsley v. Doble*, with regard to the under-sheriff, did not make a bailiff's admission receivable.

(2) *Drake v. Sykes*, 7 T. R. 117. By Lord Ellenborough, in *North v. Miles*, 1 Camp. 389, that a bailiff's general conversation with an indifferent person is not evidence against the sheriff. The bailiff's authority must be proved in every particular case, *ib.*

(3) *Bowcher v. Calley*, 1 Camp. 391, n. In *North v. Miles*, 1 Camp. 389, it was held, that what was said by a bailiff, when asked by the plaintiff's attorney before the return of the writ, why he did not execute it, was evidence against the sheriff. The action was for a false return of *non est inventus*. Lord Ellenborough said, that the

conversation must be considered as part of the act touching the execution of the writ. And he observed that where a thing is carried on by one as a quasi principal, what he says in the course of the transaction has been held, on great consideration, to be evidence against those he represents. On the subject of the proof of the bailiff's authority, upon which there have been many conflicting decisions, it has been recently held sufficient to prove an examined copy of the writ on which the bailiff's name was indorsed, and that a person of that name actually executed the writ, and that the course of the sheriff's office was, that the name of the bailiff to whom the warrant was granted, was usually indorsed on the writ. *Scott v. Marshall*, 2 Cr. & J. 238.

(4) *Jacobs v. Humphrey*, 2 Cr. & M. 413. 4 Tyr. 272.

(5) *Alban v. Pritchett*, 6 T. R. 680, wife's receipt for wages earned by her, not receivable. *Hill v. Hill*, 2 Str. 1094. See *Anon.* 1 Str. 527. *Kerslake v. Shepherd*, Esp. Dig. N. P. 741. *Denn v. White*, 7 Esp. 112. Wife's admis-

yet a wife's admissions will be binding on the husband, if an authority to make them can be inferred. Thus it was held, in *Gregory v. Parker*, (1) that where goods had been furnished for the wife's accommodation, while her husband occasionally visited her, she might be regarded as her husband's agent respecting them; and that her letters, containing an admission of the price of the goods being unpaid, were evidence to take the case out of the statute of limitations. The authority of a wife to bind her husband by her admissions seems to have been inferred in a more unobjectionable manner, in the case of *Palethorp v. Furnish*, (2) where it was proved that the wife managed her husband's business, and generally gave orders and paid for goods.

#### Guardians.

The declarations of a guardian are not admissible in evidence against a minor who sues by his guardian. (3) And the infant's answer in Chancery by his guardian cannot be read in evidence against the infant; for the guardian is sworn and not the infant, and the guardian has not authority to prejudice the infant by his admissions. (4).

sion of a trespass, 3 P. Wms. 238; Salk. 350; Vern. 60, 109, 110. Answer of wife in equity.

(1) 1 Campb. 395. It seems to be a strong decision, that the wife had an authority to make an admission years after the time when the goods were furnished.

(2) 2 Esp. 511, n. And see *Clifford v. Burton*, 1 Bing. 199. 8 B. Moore, S. C., where the wife offered to settle a demand for goods delivered at her husband's shop in which she served, and the business of which she was in the habit of conducting. In *Emerson v. Blonden*, 1 Esp. 141, the wife agreed for apartments which were occupied by herself and her husband, and Lord Kenyon received the wife's acknowledgments as to the amount of rent due. It would seem, that it could not be inferred from the wife having authority to make the agreement, that she had authority to make the admission. In these cases respecting a wife's agency, the Courts appear to have

been led away from defining the limits of her agency, by considering the point whether she could be an agent or not. See further *Anderson v. Sanderson*, 2 St. C. 204. Holt, 591. S. C. Str. 527. Admission relating to agreement for suckling a child. Willes, 577; 7 T. R. 112; 6 T. R. 176; 4 Campb. 70, 92; 5 Esp. 145; Str. 35. *Petty v. Anderson*, 3 Bing. 170. *Barlow v. Bishop*, 1 East, 432. *Cotes v. Davis*, 1 Camp. 485. *Barker v. Wray*, 2 Russ. Ch. C. 70. B. N. P. 28. As to facts from which the wife's agency may be inferred, see *Palmer v. Sells*, 3 Nev. & M. 422.

(3) *Cowling v. Ely*, 2 Stark, C. 366. *Webb v. Smith*, R. & M. 106, declarations of a *prochein amy* before action brought. *Eggleston v. Speke*, 3 Mod. 258. See *James v. Hatfield*, 1 Str. 548.

(4) *Eccleston v. Petty*, Carth. 79. Gilb. Ev. 44. 3 P. Wms. 237, n. E. An answer, purporting to be the answer of a minor by his mother and guardian, may be read

With respect to admissions made by attorneys, they are considered as having an implied authority to make any admission for the purpose of obviating the necessity of proving any fact upon a trial; as where an attorney gives a formal admission of the execution of a deed, or of a dishonour of a bill, or where he makes propositions on behalf of his client. But whatever an attorney may happen to state in the course of conversation is not evidence in the cause. (1) With respect to the point who is such an attorney in the cause as may bind a party by his admission, it is, in general, enough to prove that the person making the admission is the attorney upon the record; (2) yet it has been held, that a letter written to a plaintiff's attorney before action brought, by the attorney who afterwards appears in the cause for the defendant, is not evidence of a fact admitted therein without further proof, that the defendant authorized the communication. (3)

against the mother in another cause, in which she is defendant in her own capacity. *Beasley v. Magrath*, 2 Sch. & Lef. 34.

(1) *Young v. Wright*, 1 Campb. 141. *Griffith v. Williams*, 1 T. R. 610. 1 East, 568. *Truslove v. Burton*, 9 B. Moore, 64. *Goldie v. Shuttleworth*, 1 Campb. 70, where it was held that the admission by the attorney, of the execution of a deed, did not preclude an objection on the ground of variance. *Milward v. Temple*, 1 Campb. 375, where it was held, that the admission of the handwriting of a person attesting a deed, was tantamount to an admission of the execution by the defendant. *Marshall v. Clift*, 4 Campb. 133. *Holt v. Squire*, R. & M. 282. That an attorney has an implied authority to make propositions; either before or after the commencement of a suit, see *Gainsford v. Grammar*, 2 Campb. 9. See *Roe v. Wilkins*, 3 Bing. N. C. 86, admission by attorney that his client claimed under a particular deed, by way of statement. In *Young v. Wright*, 1 Campb. 141, Lord Ellenborough says, "it is clear, that whatever the attorney says in the course of conversation, is not evidence in the cause;" the witness had been asked, whether

he had not been told by the attorney for the plaintiff, that the bill, which was the subject of the action, was an accommodation bill. *Wilson v. Turner*, 1 Taunt. 30. In *Perkins v. Hawkshaw*, 2 St. 240, *Holroyd, J.*, held, that matter of conversation with an attorney could not be evidence against his client; the conversation in question amounted to an admission of the signature of a deed.

(2) *Marshall v. Clift*, 4 Campb. 133, as to admissions by clerks of attorneys, which may be given in evidence. *Standage v. Creighton*, 5 C. & P. 406. Per Lord Tenterden, in *Taylor v. Williams*, 2 B. & Ad. 656. By agents of attorneys, *Truslove v. Burton*, 9 B. Moore, 64. See *Meyer v. Sefton*, 2 St. 274, letter of attorney with client's signature.

(3) *Wagstaff v. Wilson*, 4 B. & Ad. 339. And see *Burghart v. Angerstein*, 6 C. & P. 695. In *Marshall v. Clift*, 4 Campb. 133, the attorney's letter relied upon to prove the joint-ownership, contained an undertaking to appear for them, which was a step in the cause. In *Roberts v. Lady Gresley*, 3 C. & P. 380, the party whose letter was produced had already acted as agent for the defendant. If an attorney leaves the conduct of a cause to

An admission for the purpose of the trial of a cause may be used upon a new trial. (1)

By counsel.

With respect to admissions by counsel, it has been held, that a *special case*, signed by the counsel on both sides, for the opinion of the Court above, and stating facts proved at the trial of the cause is admissible as evidence of those facts on a new trial. (2) Whether admissions, made by the defendant's counsel on a former trial, can be received as evidence against the client on a new trial, even supposing the client to have been present and within hearing, is a question upon which doubts have been entertained. Such evidence has been rejected in one case at *nisi prius*. (3)

Authority.  
Criminal case.

Evidence of facts, by the admissions of agents, is receivable in criminal as well as in civil cases. Thus, on the impeachment of Lord Melville, (4) the House of Lords decided that a receipt given in the regular and official form by Mr. Douglas (who, as it was proved, had been appointed by Lord Melville to be his attorney, to transact the business of his office of treasurer of the navy, and to receive all necessary sums of money, and sign receipts for the same) was admissible as evidence against Lord Melville, to establish this single fact, that a person appointed by him, as his paymaster, did receive from the Exchequer a certain sum of money, in the ordinary course of business. "The first step in the proof of the charge," said the Lord Chancellor, "must advance by evidence applicable alike to civil and to criminal cases; for a fact must be established by the same evidence, whether it is to be fol-

his clerk, what the latter does therein binds the party. Per Lord Tenterden, in *Taylor v. Williams*, 2 B. & Ad. 856.

(1) *Elton v. Larkins*, 1 M. & Ro. 196. *Langley v. Earl of Oxford*, 1 M. & Wel. 508, where there had been an alteration in the pleadings. *Doe d. Wetherall v. Bird*, 7 C. & P. 6. A summons may be taken out to withdraw the admissions.

(2) *Vant Wort v. Wolley*, R. & M. 4. In equity a party has been obliged to produce cases submitted

for the opinion of counsel, but not the opinions. *Preston v. Carr*, 1 Y. & J. 175. See *Bolton v. Corporation of Liverpool*, 1 P. Coop. 22. That a statement prepared by an attorney for the opinion of counsel, is evidence against a party, or those identified in interest with him. See *Bishop Meath v. Marquis of Winchester*, 3 Bing. N. C. 211.

(3) See *Colledge v. Horn*, 3 Bing. 119.

(4) 29 Howell's St. Tr. 746, 763.

lowed by a civil or criminal consequence, but it is totally a different question, in the consideration of criminal justice, as distinguished from civil, how the noble person, now on trial, may be affected by the fact, when so established. The receipt by the paymaster would, in itself, involve him civilly, but could, by no possibility, convict him of a crime."

It would seem that a surety cannot, in general, be affected by evidence of an admission made by his principal. Thus, in an action upon a guarantee to pay for goods sold and delivered to a third person, what such person has admitted respecting the delivery of the goods is not evidence to charge the person giving the guarantee. (1) In an action for contribution brought by one surety against a co-surety, where a defence was set up, that the party for whom they had become sureties had discharged the bond, for the due payment of which they were responsible, the declarations of the obligee, as to the account upon which he received the money, and proof of the way in which he applied it, were held to be inadmissible, it not appearing that such declarations were made at the time of payment. (2) Where a party had become surety, by a bond for the faithful conduct of a clerk, it was held, in an action upon such bond, that an admission by the clerk, made after he was

Surety.

(1) *Evans v. Beattie*, 5 Esp. 26. In *Perchard v. Hamilton*, 1 Esp. 394, an action by a sheriff upon a bond to indemnify him against defaults of his bailiff. A written admission by the bailiff of having received levy-money, was held by Lord Kenyon to be admissible against the defendant, on the ground that the bailiff was in fact the defendant in the action. It does not appear that there was any evidence to shew that the defendant was indemnified by the bailiff. But in a trial at Warwick, Bayley, B., held that a written admission of sums received by a clerk was not evidence against a surety in an action brought by the master upon a bond of indemnity. The case of *Perchard v. Hamilton* was cited, but was thought by Bayley, B., not to apply. It would seem, however, to

be in point. In *Goss v. Watlington*, 3 B. & B. 136. *Whitnash v. George*, 8 B. & C. 556, *vide supra*. The entries of deceased principals were received on the ground that they were made in accounts which the sureties had contracted that they should faithfully keep. In *Cutler v. Newling, Manning's Dig. Privies*, 137, on the execution of a writ of inquiry on an indemnity bond, an admission by the principal of the amount of damnification was considered by Holroyd, J., inadmissible. See *Bacon v. Chesney*, 1 St. 192, that the subsequent declarations of a principal are not admissible to prove the terms of the original contract.

(2) *Dunn v. Slee*, Holt, 401. Such a declaration made at the time of payment, would seem to be admissible as part of the *res gesta*, *ib.*

discharged, of various sums which he had embezzled, was not receivable in evidence against the surety. (1)

Privy of interest.

Admissions are not only receivable against the parties, who make or authorize them, but also against persons identified in interest with those parties. The rules for the admissibility of such evidence are analogous to those which are found in the doctrine of estoppels, and which govern the admissibility of verdicts, judgments, and depositions. The reader is therefore referred to the second part of this Work, which treats of written evidence, for considerable illustration of the present subject. It has, indeed, been necessary to anticipate some portion of what would properly belong to the second part of the Work, particularly as regards answers in Chancery, for the elucidation of the points which belong to the present Chapter.

Privies in blood.

Thus, with regard to privies in blood and privies in law, the declarations of a deceased occupier of land, that he rented it under a certain person, are evidence of that person's seisin against a party claiming as the heir at law of such occupier, to explain the nature of the occupation, and to shew that it was not adverse. (2) The declarations of an intestate are evidence against his administrator. (3)

In law.

In estate.

With respect to admissions made by persons who have been privies in estate to the parties, against whom the admissions are used, the evidence, when the parties are deceased, is ge-

(1) *Smith v. Whittingham*, 6 C. & P. 78. See *McGahey v. Alston*, 2 M. & Wel. 213. *Goss v. Watlington*, 3 Br. & B. 132. *Middleton v. Melton*, 10 B. & C. 317.

(2) *Doe d. Human v. Pettett*, 3 B. & A. 223. If this case is to be treated as a case of admissions, it would seem immaterial, that the declarant was deceased. But the evidence may be considered also as a declaration explanatory of possession, or as a declaration against interest. See *Peaceable v. Wat-*

*son*, 4 Taunt. 16. *Doe v. Jones*, 1 Campb. 367. These points are illustrated by the doctrine concerning the admissibility of verdicts against privies in law and in blood, *infra*, part 2. *Locke v. Norbonne*, 3 Mod. 141. See *Outram v. Morewood*, 3 East, 346. Co. Litt. 352, a. Pol. 61, 66. Com. Dig. Estoppel, B., 3 T. R. 365.

(3) *Smith v. Smith*, 3 Bing. N. C. 32. The plaintiff was regarded as claiming under the intestate, though, in fact, he need not have done so.



nerally admissible on a different principle, as a declaration against interest. (1) And when the parties are alive, the evidence may frequently seem admissible, as explanatory of acts done or forborne, or of the fact of possession. (2) But without reference to either of these principles, it would seem that an admission by a proprietor or occupier possessing any interest, would be evidence as to the nature and extent of that interest, against a party who was in privity of estate with him. (3) The receipts for a modus, given by a vicar's lessee, are evidence against the vicar, by reason of the privity of estate. (4) An answer in Chancery is admissible in evidence against a privity in estate. (5) A statement in a lease by a landlord has been held admissible against a person who claims under a subsequent lease of the same land. (6) A letter written by a vicar, in respect of the property of the vicarage, is evidence against his successor. (7)

It has been held, upon an issue between two persons, *Assignment.* whether a third person died possessed of certain property, that evidence might be given of a declaration, made by that third person, that he had assigned the property; the party, against whom the declarations were adduced, claiming under that person. (8) A case stated for the opinion of counsel, touching the right of *Presentation.*

(1) *Vide supra.*

(2) *Vide supra.*

(3) Doe d. Manton v. Thrupp, 9 Bing. 41. Walker v. Bradstock, 1 Esp. 458. Davis v. Pierce, 2 T. R. 53. Baggaley v. Jones, 1 Campb. 367. Doe v. Pettet, 5 B. & A. 223. Doe v. Rickerby, 5 Esp. 4, *supra.* 12 Vin. Ab. A. b. 38, pl. 10. Tindal v. Whitrow, 1 C. & P. 22. With respect to the amount of interest requisite, in a person whose declaration can bind another by reason of privity of estate, see *infra*, as to the verdicts in this respect. As to the effect of declarations by tenants against the interest of their reversioners, per Patteson, J., Tickle v. Brown, 4 Ad. & E. 378.

(4) Jones v. Carrington, 1 C. & P. 329. So although the party giving the receipts be entitled only under an agreement for a lease, *ib.* It would seem that the receipts

were admissible on a more general ground, as being declarations against interest by deceased persons.

(5) Earl of Sussex v. Temple, Lord Raym. 310. In this case the Court went the length of determining, that the answer might be read against persons in occupation of property, on proof that it was the reputation of the county, that the lands had belonged to the person making the answer.

(6) Crease v. Barret, 1 Cr. M. R. 932.

(7) Doe d. Coyle v. Cole, 6 C. & P. 359.

(8) Ivat v. Finch, 1 Taunt. 141. The judgment also proceeded on the ground of a declaration against interest; which seems to be a safer ground, as the third person had parted with the possession before the declaration was made. *Vide infra.*

presentation to a living by a bishop, was held to be evidence against a subsequent bishop of the same see, on a question touching the right of presentation to the same living. (1)

#### Modus.

An ancient statement, concerning the payment of tithes of a parish by a modus signed by the rector for the time being, is evidence against a succeeding rector. (2) An answer to a bill filed in the Court of Exchequer, in a suit instituted for tithe-hay by a vicar against the rector and others (owners of lands in the parish), in which answer the defendants disputed the vicar's claim, and declared that the tithes in question belonged to the rector, will be evidence, in an action for tithes by a succeeding rector against owners or occupiers of the same lands, for the tithes of which the former suit was instituted. (3) "This appears to me," said Lord Ellenborough, "not to be *res inter alios acta*, but, *inter eosdem acta*; and was not only evidence, but strong evidence, against the defendant, who stood in the same place, by derivation of title and by legal obligation, as the former occupier of the same land: and that former owner, upon his oath, in a suit against him by the vicar, has declared, that the tithe is due to the rector, and not to the vicar; and now that same person, *in effect*, (that is, the present owner, who purchased of the former owner the very lands, over which tithes were now claimed,) is deraigning the title of the rector in favour of the vicar."

#### Surveys.

Although ancient books of survey and maps, when they are not in the nature of public documents, (4) have been in some cases considered as not being legitimate evidence of

(1) *Bishop of Meath v. Marquis of Winchester*, 3 Bing. N. C. 183. The decision was also rested on the ground of the statement being against interest. There was no personal knowledge of the facts contained in the statement, but they were all evidenced by written documents.

(2) *Maddison v. Nuttal*, 6 Bing. 226. Receipts of incumbents have been received upon the same ground, though it would seem that,

in both cases, the declaration was admissible as being against interest.

(3) *Lady Dartmouth v. Roberts*, 16 East, 334. The suit was abandoned by the vicar, who from that time had acquiesced. See also *Travis v. Chaloner*, 3 Gwill. 1237. *Ashby v. Power*, 3 Gwill. 1239. *Benson v. Olive*, 2 Gwill. 701. *Earl of Sussex v. Temple*, 1 Lord Raym. 310.

(4) *Vide supra*.

boundary, even where they might seem, upon principle, to be receivable on the ground that the boundary was a matter of public interest and concern, (1) yet this species of evidence is frequently available by way of admission, where there is a privity of estate between the person against whom the survey or map is used, and the person directing it to be made. Thus it was ruled by Lord Holt, that if A. be seised of the manors of B. and C. and, during his seisin of both, he causes a survey to be taken of the manor of B., and afterwards the manor of B. is conveyed to E., and afterwards there are disputes between the lords of the manors, B. and C., about their boundaries, this old survey may be given in evidence. (2) In like manner entries of receipt of rents by a deceased steward have been admitted, in a suit between two persons who both claimed under the employer of that steward. (3)

With respect to admissions by persons in possession of chattels or negotiable securities against subsequent proprietors, which may be thought analogous to admissions by privies in estate, it appears to be a rule, that where a person must recover through the title of another, he is bound by the declaration of the party through whom he claims. Thus, if a person bring an action upon a bill of exchange, the declaration of a person, who, at the time when such declaration was made, was holder of the bill, and who had not parted with it till after it was due, is evidence against the plaintiff, being made by one according to whose title his own must stand or fall. (4)

Prior holders  
of negotiable  
securities.

Privy.

(1) *Vide supra*, case of parish map.

(2) *Bridgman v. Jennings*, 1 Lord Raym. 734. And see *Davies v. Pierce*, 2 T. R. 53. *Allott v. Wilkinson*, 4 Gwill. 1585; 2 E. & Y. 293; B. N. P. 283. That such a survey is not evidence against a stranger, per Lord Holt, *ib. Anon.* 1 Str. 95; 1 Lord Raym. 734; 5 T. R. 123; 12 Vin. Ab. 90, pl. 12. It has been said, that an old map has been allowed in evidence, where it came along with the wri-

tings, and agreed with the boundaries adjusted in an ancient purchase, *Gilb. Ev.* 78.

(3) *Doe d. Strode v. Seaton*, 2 Ad. & Ell. 171, cases where the evidence would have been receivable as a declaration against interest have sometimes been determined on the principle under consideration. As to tithe receipts, see 3 E. & Y., tithe cases, 1129, 1131.

(4) *Benson v. Marshall*, cited in *Shaw v. Broom*, 4 Dow. & R. 731.

No privity.

But it seems that the analogy with respect to the admissions of privies in estate is not adhered to, where title to negotiable instruments is derived from persons who have made admissions, but where there is not any existing identity of interest. In such cases, the right of a person holding by a good title is not to be cut down, by the acknowledgment of a former holder that he had no title. Thus, in an action by the indorsee against the maker of a promissory note payable with interest on demand, the declarations made by the payee, whilst the note was in his possession, to the effect that he gave no consideration for it to the maker, were held inadmissible for the defendant, on the ground that the plaintiff could not be identified with the payee, the bill not being overdue at the time of the indorsement. (1) The declarations were not those of a person who held the negotiable security under the same circumstances as the party to the action.

In *Beauchamp v. Vassey*, it was held, that as the indorsee of a promissory note does not claim by the title of the indorser, but has a title of his own as indorsee, he ought not to be affected by any declarations of the indorser and payee, the note not being taken without consideration, or after it was due, notwithstanding the declarations were made whilst the payee and indorser were in the possession of the note. (2)

(1) *Barough v. White*, 4 B. & C. 327. See this case explained by Parke, J., in *Woolway v. Rowe*, 1 Ad. & Ell. 116. It would seem that the objection of the payee being living, which was made by some of the Judges, could not hold if the evidence were treated as an admission by a privy in estate. *Woolway v. Rowe*, 1 Ad. & Ell. 114. Though the bill was not overdue, and therefore there was not a general identity of interest between the payee and indorsee, yet the point, of there being no original consideration for the bill, was a defect in the original title, which might be material to the validity of

the derivative one. *Smith v. De Wruitz*, R. & M. 212, appears to have been decided upon a misapprehension of the point determined in *Shaw v. Broome*, 4 D. & R. 731. Such admissions, where the circumstances permit, seem to be receivable, on the ground of being declarations against interest by deceased persons. Per *Holroyd, J.*, in *Barough v. White*, 4 B. & C. 327. See further on this subject, *Banks v. Colwell*, cited in *Brown v. Davis*, 3 T. R. 80. *Pocock v. Billings*, 2 Bing. 269. *Carter v. Sherwood*, 1 C. & P. 148. *Peckham v. Potter*, 3 C. & P. 232.

(2) 1 B. & Ad. 91. An exception

But as a person cannot be regarded a privy in estate with a subsequent possessor of the estate, except during the time when the estate was in his own possession, it has been held, that an answer in Chancery respecting the title to an advowson, filed by one who had been formerly seised of the advowson, but who had conveyed it away twenty years before the answer, was not admissible against a person claiming the advowson through him. (1) And admissions by a mortgagor, made after he had parted with his interest by a settlement, have been held not to be admissible on behalf of a mortgagee, to shew that the money had actually been advanced on the mortgage, the mortgagee seeking to avoid the settlement as being voluntary. (2) An admission made by a person who takes a bankrupt's goods in execution, that he knew an act of bankruptcy had been committed, is not evidence against a person who takes the goods by assignment from the sheriff, where the admission is subsequent to the assignment. (3) It has been held, that the declaration by a prior owner of property whilst in possession, as to the person who was to be entitled to his property after his death, was not receivable against a subsequent owner of the same property; though we have seen that upon more than one ground, a declaration of such prior owner, to the effect that he had only a life estate, is admissible. (4)

Privy of estate determined.

Admissions respecting the subject matter of a cause, by a person who at the time of making them had the same interest in such matter as one of the parties to the cause, are admissible

Author of admission not called.

is there made as to declarations contemporaneous with the making of an instrument, and the case of *Kent v. Lowen* was referred to, where letters from the payee to the maker were admitted, which stated an usurious consideration for the note. It was said, that if the declarations had been made, as in the case of *Kent v. Lowen*, at the time of the contract, the case might be different. It is to be observed, that in *Kent v. Lowen*, the letters were the usurious contract itself, and it can make no difference whether an act consist of oral declarations or not. Some confusion

is, however, introduced into the case by Lord Ellenborough stating, that evidence of an act done was admissible against persons claiming under those who did the act, whereas the admissibility of the evidence does not appear to depend on the privy of the parties.

(1) *Gully v. Bishop of Exeter*, 5 Bing. 171.

(2) *Doe d. Sweetland v. Webber*, 1 Ad. & El. 733.

(3) *Deady v. Harrison*, 1 St. 60.

(4) *Harrison and Wife v. Moore*, Nott. Spr. Ass. 1837, per Little-dale, J.

in evidence against that party, though the person who made the admissions is alive and might be called as a witness. (1) The same rules seem to apply to such admissions of agents as are receivable. There is perhaps some reason for the distinction between the rule which prevails in such cases, and that which governs declarations against interest, inasmuch as in the latter case, the party to the suit is to be affected by the declaration of a person with whom he has no community of interest, and for whose assertions he is not responsible.

There are several other doctrines applicable to the subject of admissions, for which the reader must be referred to the second part of the Work: the principles alluded to having been established and elucidated in cases arising upon the admissibility of verdicts and depositions. And it may be observed, that the doctrines, which have been treated of in the present chapter, derive considerable illustration from that branch of the law of evidence.

Besides the admissions, which have been more particularly the subject of consideration in the present chapter, there is another class consisting of admissions made in the course of the pleadings of a cause, and particularly where there is a payment of money into Court. The rules which govern admissions of this description are altogether technical, and more properly belong to that branch of law which treats of the practice adopted by Courts, for ascertaining previously to a trial the material facts in dispute between the litigating parties.

(1) *Woolway v. Rowe*, 1 Ad. & El. 114.

## SECTION II.

*Confessions.*

The confessions of prisoners are received in evidence upon the same principle upon which admissions in civil suits are received, *viz.* the presumption that a person will not make an untrue statement militating against his own interest. In criminal cases, a confession in civil suits, carries with it a greater probability of truth than a confession, the consequences being more serious and highly penal: "*habemus optimum testem, confitentem reum.*" (1) But it is to be observed, there may not unfrequently be motives of hope and fear inducing a person to make an untrue confession, which seldom operate in the case of admissions. (2) And, further, in consequence of the universal eagerness and zeal which prevail, for the detection of guilt, when offences occur of an aggravated character, in consequence also of the necessity of using testimony of suspicious witnesses for the discovery of secret crimes, the evidence of confessions is subject, in a very remarkable degree, to the imperfections attaching generally to hearsay evidence. (3) For these reasons, the statements of prisoners are often excluded

(1) Confessions have been treated as the highest and most satisfactory evidence of guilt. Grose, J., delivering the opinion of the Judges in Lambe's case, 2 Leach, 554, Gilb. Ev. 137, Warickshall's case, 1 Leach, 263.

(2) Foster's Discourses, 243; 4 Bl. Comm. 357. Instances have occurred, of persons confessing themselves guilty of crimes of which they were innocent, and of their acting, whilst under the imputation of crimes, in a manner affording a strong presumption of guilt. See case of Mr. Harrison, cited 1 Leach, 264, n. A case mentioned by Lord Hale, in his Pl. Cr. See also the Confessions of Witches, 2 Howell, 1049; 4 Howell, 817; 6 Howell, 647. The Suffolk Witches tried by Lord Hale, 8 Howell, 1017.

(3) Foster's Disc. 243, where it

is observed, that words in criminal cases are often misreported through ignorance, inattention, or malice, and extremely liable to misconstruction, and that the evidence cannot be disproved by negative evidence, in the same manner as facts. Speech of Mr. Adam, in Crossfield's trial for High Treason, 26 Howell, 57, where it is observed, that the person relating the confession is generally relieved from the apprehension of punishment, and that what people have said upon a subject shocking or otherwise exciting, is usually repeated with exaggeration. And see per Alderson, B., in Rex v. Simons, 6 C. & P. 540, where a prisoner's conversation with his wife was repeated differently by the witnesses.

from being given in evidence, in cases where they would be unobjectionable as the admissions of a party to a civil suit.

**Examinations.** Confessions of prisoners are often made in the course of their examination before magistrates. These examinations are taken in the course of a judicial proceeding, and according to prescribed forms; consequently the evidence of confessions contained in them is obviously free from many of the objections incident to various other species of hearsay evidence.

As the principles applicable to confessions in general apply to such as are contained in examinations before magistrates, it has not been thought expedient to treat of examinations apart from the general subject. A more particular account of such examinations, and the mode of proving them, will be found in the second part of the Work, which however, is unavoidably anticipated in some measure in the present section. Various points also, as to the verbal proof of confessions made in the presence of magistrates, will be considered in the chapter on *Secondary Evidence*.

**Whole confession.**

As we have had occasion to observe in treating of admissions, it is necessary that the whole of what a prisoner has said, on the occasion of making a confession, should be related entire. This rule did not prevail in early times, when it was usual, in state trials, to select arbitrarily from a prisoner's examination any part that might be prejudicial to him, though the whole examination, if taken together, might have had a different effect. (1) We have seen that the rule laid down in the *Queen's case*, (2) respecting admissions and confessions, requires not only that those parts of a conversation

(1) See, amongst many other instances, the declaration of Garnet, in his handwriting, read upon his trial for the Gunpowder Plot. In the original confession, in the State Paper Office, there are letters in Sir E. Coke's handwriting, pointing out to the officer of the Court what he was to read, and which produce quite a different effect from that of the whole declaration

taken together. Jardine's Criminal Trials, vol. ii, p. 357.

(2) 2 Br. & B. 298. The ground assigned by Lord Tenterden, that it would not be just to take part of a conversation as evidence against a party, without giving to the party, at the same time, the benefit of the entire residue, seems open to exception, *vide supra*, On Admissions.



should be received which explain or qualify the language of a confession, but such also as are not connected with the confession, provided they relate to the subject matter of the charge. Though it may, in strictness, be doubted, whether there is sufficient reason for admitting the statements of a prisoner, for the purpose of proving facts in his favor, without reference to their effect in explaining or qualifying his confession, yet in practice such statements are commonly received for that purpose.

Effect of parts favorable to prisoner.

It has been held, that the reading of a prisoner's statement, at the end of depositions taken before a magistrate, does not in general give the prisoner a right to consider the depositions as given in evidence on the part of the prosecution, unless the statement specifically applies to and is essentially connected with any of the previous depositions. (1)

With respect to the effect of what the prisoner may have said favorable to himself, at the time of making a confession, it is conceived that the same rule prevails as in the case of admissions, and that a jury may believe one part of the prisoner's statements and disbelieve another. Thus, where a prisoner was indicted for stealing a piece of cloth, and it was proved that he had sold it, very soon after it was lost, at a place distant from the residence of the prosecutor, and the prisoner's examination was given in evidence, in which he stated that the cloth was honestly bought and paid for, Mr. Justice Parke observed, "that in consequence of the prosecutor using what the prisoner had said as part of his evidence, it became evidence for the prisoner as well as against him, but still it was like all evidence given in any case, and it was for the jury to say, whether they believed it." (2)

(1) *Rex v. Pearson*, 7 C. & P. 671. An example is put of specific reference, as where a prisoner states, that what a particular witness has deposed to is true.

(2) *Rex v. Higgins*, 3 C. & P. 604. The prisoner was found guilty. The statement might have been adduced by the prosecutor for the

purpose of identifying the prisoner, as the person selling the cloth; see *Rex v. Steptoe*, 4 C. & P. 397. The point may not unfrequently arise, where a prisoner admits killing a man, but, at the same time, states facts, which, if true, would reduce the crime to manslaughter, and, in such a case, different ques-

It has been supposed, that where a prosecutor uses a prisoner's statement, he gives to the parts favorable to the prisoner more weight than would properly belong to a party's assertion of his own innocence, and that the facts, contained in such favorable part of the prisoner's statement, are to be considered as established until disproved. (1) It may be doubted, however, whether these opinions are well founded, when it is considered that the original object of introducing the whole of a prisoner's statement is merely to guard against any misapprehension of the prisoner's meaning, in the terms which he has used to confess himself guilty of a crime. It is clearly competent for the prosecutor to contradict the parts of a prisoner's statement which are favorable to him. (2)

*Demeanor.*

Analogous to similar cases of admissions, a confession may be collected or inferred from the conduct and demeanor of a prisoner on hearing a statement affecting himself. (3) As such statements frequently contain much hearsay and other objectionable evidence, and as the demeanor of a person upon hearing a criminal charge against himself is liable to great misconstruction, evidence of this description ought to be regarded with much caution. It has been decided, that the deposition of a witness, or the examination of another prisoner, taken in a criminal case before a magistrate, is not admissible in evidence merely because the party affected by it was present, or might have had an opportunity of cross-examining or of commenting on the evidence. The party is prevented from interposing at his will and pleasure, and, therefore, the same inference ought not to be drawn from his silence

tions will arise, according as there is, or is not other evidence produced. See *Rex v. Clewes*, 4 C. & P. 226.

(1) In *Jones's case*, 2 C. & P. 629. It is said, that if there is not evidence in the case, independently of the prisoner's statement, which is incompatible with the parts of it favorable to the prisoner, these must be taken to be true. See *ib.* a case before Garrow, B. A simi-

lar opinion appears to have been expressed by Littledale, J., in *Rex v. Clewes*, 4 C. & P. 226.

(2) Per Bosanquet. *Jones's case*, 2 C. & P. 629.

(3) Such evidence is admissible, though the statement be made in the presence of the prisoner by his wife, and whether he makes answer or not. *Rex v. Bartleet*, 7 C. & P. 832. *Rex v. Smithies*, 5 C. & P. 332.

or his demeanor, as is frequently done in the case of conversations. (1)

A prisoner's confession is sufficient ground to warrant a conviction, although there is no other proof of his having committed the offence with which he is charged. And it appears, from several cases, that his confession may, in some instances, even supply the absence of all proof as to the fact of the commission of the offence charged. (2) But a confession is obviously not conclusive evidence against a prisoner, and when it involves matter of law, is to be received with more than usual caution. (3)

Effect of confession.

It has been considered necessary in all cases, previous to receiving a confession in evidence, to inquire whether it has been voluntary. The usual questions are, whether the prisoner has been told, that it would be better for him to confess, or worse for him if he did not confess, or whether any language to that effect has been used. The presumption of the truth of the statement is supposed to cease, when there is ground to apprehend that it may have been wrung from a timid and apprehensive mind, deluded by promises of safety, or subdued by threats of violence or punishment. (4) This, as was before observed, is a suppo-

Voluntary confession.

(1) *Appleby's case*, 3 St. 33. *Melen v. Andrews*, M. & M. 336. *Turner's case*, 1 Mo. Cr. C. 347. The case of *Rex v. Edmunds*, 6 C. & P. 164, seems of doubtful authority. There, *Tindal, Ch. J.*, received a statement upon oath, made on the occasion of a summary conviction in the presence of a prisoner.

(2) In *Rex v. Eldridge, R. & R. Cr. Ca. 440*, the Court thought there was sufficient evidence to confirm the confession. In *Rex v. Falkner, R. & R. Cr. Ca. 481*, the only other evidence was, that the prisoner had sent a message to the party alleged to have been robbed, and who did not appear, to prevent his appearance. In *Rex v. White, R. & R. Cr. Ca. 508*. *Rex v. Tippet, ibid. 509*, no person could swear that the property

(which was oats) had been actually stolen, though there was strong confirmatory evidence making the theft probable. The report states that most of the Judges were of opinion, that without the confirmatory evidence, the jury might have convicted on the prisoner's confession. In *Wheeling's case*, *Leach 311, n. a.*, it is stated to have been determined by *Lord Kenyon*, that a prisoner might be convicted on his own confession, though totally uncorroborated by any other evidence.

(3) *Vide supra*, Admissions of matters of law. *Philps' case*, 1 Mo. Cr. C. 271, where a prisoner's statement, as to the ownership of a vessel, was negatived by the Ship-registry Act. So also as to the confession of a valid marriage.

(4) The rule extends to all state-

sition not wholly unconfirmed by experience. But, perhaps, the cases are rare, in which such unfounded self-accusations occur, or, at least, where a jury would be misled by them : and certainly the rule occasions, in a multitude of instances, the escape of the guilty. There is a general feeling, which seems to be well founded, that the rule has been extended much too far, and been applied in some cases, where there could be no reasonable ground for supposing that the inducement offered to the prisoner was sufficient to overcome the strong and universal motive of self-preservation. The doctrine has also been attended with much inconvenience, in consequence of the nice distinctions, and numerous, and sometimes contradictory decisions, to which it has given rise. (1)

Confession on  
oath inadmis-  
sible.

If a prisoner's examination before a magistrate be taken upon oath, it cannot be received in evidence as a judicial examination : (2) and it seems, in such a case evidence could not be given, as at common law, of the confession. (3) It has been held, that the examination of a bankrupt upon oath taken before commissioners was not receivable in evidence. (4) Where a prisoner, among other persons, was

ments by a prisoner, which may affect him criminally, though in terms they charge another person. *Rex v. Enoch*, 5 C. & P. 540, or purport to be a refusal to confess, *Rex v. Tyler*, 1 C. & P. 129, n.

(1) In *Rex v. Row*, R. & R. Cr. Ca. 153. Lawrence, J., stated, that he had reserved several points on the subject of confessions, in consequence of the *obscurity and discordancy of the authorities*. In *Rex v. Thompson*, Leach, 292, the Court say, that it is almost impossible to be too careful upon this subject, and that too great nicety could not be preserved upon it; and in *Rex v. Cass*, Leach, 293, n., Gould, J., says, that the slightest hopes of mercy held out, would invalidate a confession. On the other hand, it has been said by Mr. Justice Parke, that the doctrine of inducements has been carried to the verge of common

sense. On this subject, see Bentham's *Rationale of Judicial Evidence*, Jurist, No. 7, vol. xl. Ed. Rev. p. 166, 169.

(2) *Rex v. Smith and Hornage*, 1 St. 242. *Rex v. Rivers*, 7 C. & P. 177. Upon the principles applicable to the law of secondary evidence, proof was in these cases refused, for the purpose of shewing that the witness was not sworn. B. N. P. 242. Hawk. P. C., b. 2, c. 46, s. 37. Kelynge, 2. 7 Geo. 4, c. 64, s. 2. It may be doubted how far the circumstance of a prisoner being sworn is calculated to induce him to make an untrue confession.

(3) See *Rex v. Lewis*, 6 C. & P. 162. The point belongs to the doctrine of secondary evidence.

(4) *Rex v. Britton*, 1 M. & Ro. 297. *Vide supra*, in *Rex v. Mercer*, 2 St. 366, a compulsory examination before a Committee of

summoned before a committing magistrate upon an investigation in a matter of felony, (no person being specifically charged with the offence,) and the prisoner was sworn and made a statement, and at the conclusion of the examination was committed for trial, this statement was not received against the prisoner, on the ground of it's having been made at the same time as all the other depositions and on the same day upon which he was committed. (1) And where one of several persons was examined by the committing magistrate as a witness against the others, upon a charge of felony, and, after being examined by him, committed to take his trial, it was held, that what he said as a witness could not be used against him upon the criminal charge. (2) The principle, however, of these decisions appears questionable, as the prisoner in his capacity of a witness might have refused to answer any questions having a tendency to expose him to a criminal charge. Accordingly, where a prisoner had been examined upon oath on a charge against another person, Parke, B., received the evidence of the examination as a confession. (3) And it would seem, that generally a statement upon oath by a person not being a prisoner at the time, and the statement not being compulsory, might be used in evidence against him on a criminal charge. (4) Where a prisoner before the committing magistrate was sworn by mistake, being supposed to be a witness, but his deposition was afterwards destroyed, and he was cautioned, a subsequent statement which he made was held receivable. (5) An affidavit by a prisoner made in a suit in Doctors' Commons, has been read against him. (6)

Admissible.

It is not necessary to the admissibility of a confession, that it should be spontaneous, it will be received notwithstanding it has been elicited by means of spiritual exhortations by a

Nature of inducement.

Spiritual inducements.

the House of Commons was received on a trial for a misdemeanor.

(1) *Rex v. Lewis*, 6 C. & P. 162.  
 (2) *Rex v. Davis*, 6 C. & P. 177; and see as to the examinations of persons indicted for stealing a will or title-deeds, not being evidence. 7 & 8 Geo. 4, c. 29, s. 22, 23, 24.

(3) Howarth's case, Greenw. Col. 138, n.

(4) *Rex v. Tubby*, 5 C. & P. 530, referred to in *Rex v. Lewis*, 6 C. & P. 162.

(5) *Rex v. Webb*, 4 C. & P. 564.

(6) *Rex v. Walker*, cited by Gurney, B., 6 C. & P. 162.

## Intoxication.

clergyman, (1) or by a person not a clergyman, and addressed to a prisoner of tender years. (2) It seems that exhortations, simply to speak the truth, will not invalidate a confession, but that in such cases, where the motives suggested to the prisoner are not shewn to have been of a spiritual nature, slight proof of temporal inducements will avoid it. (3) Even where a constable gave liquor to a prisoner for the purpose of obtaining a confession, and the prisoner confessed whilst under the effects of intoxication, it was held that the confession was receivable, however little it might weigh with a jury. (4) A promise by a constable to a prisoner, that if he would confess, he should see his wife, has been held not to render inadmissible a confession made in consequence of such promise, no hope of favor being held out as to the charge upon which the prisoner was in custody. (5)

## Deception used.

The circumstance that some deception has been practised, in order to obtain a prisoner's confession, will not render it the less receivable in evidence: as where a person promised a prisoner, that what he had to say should go no further; (6) and where one took an oath to that effect: (7) so where a prisoner asked the turnkey, if he would put a letter in the post, and upon his promising that he would do so, gave him the letter, which was detained by the turnkey, and given in evidence as a confession: (8) So where artifice was used to induce a prisoner to suppose that some of his accomplices were in custody, under which

(1) *Gilham's case*, 1 Mo. Cr. C. 186.

(2) *Wild's case*, 1 Mo. Cr. C. 455. The Court disapproved of the manner in which the confession had been obtained. See *Rates's case*, Chetw. Burn, tit. Confession, 2 Russ. 648. The question, whether the inducement was of a temporal nature or not, which is sometimes a nice question of fact, is for the decision of the Judge, *ib.*

(3) *Rex v. Court*, 7 C. & P. 486, where the magistrate said, "be sure to tell the truth," the statement was admitted. *Rex v. Shepherd*, 7 C. & P. 579, where the constable said, "you had better not add a lie to the crime

of theft," the statement was rejected.

(4) *Rex v. Spilsbury*, 7 C. & P. 187.

(5) *Rex v. Thomas*, 6 C. & P. 353. In *Rex v. Green*, 6 C. & P. 656, the prisoner's statement was received, after his saying, that "if his handcuffs were taken off he would tell." Taunton, J., observed, that he believed no man ever makes a confession voluntarily, without proposing to himself some advantage to be derived from it.

(6) *Rex v. Thomas*, 7 C. & P. 345.

(7) *Rex v. Shaw*, 6 C. & P. 373.

(8) *Donington's case*, 2 C. & P. 418.

mistaken supposition he made a confession. (1) Where a constable, in order to extract a confession, assumed the prisoner's guilt, asking her how she came to poison her uncle, the confession in answer was received. (2) In these cases, there was no reason to suppose, (which is the main point to be considered,) that the inducement held out was calculated to make the confession an untrue one.

A confession, obtained without threat or promise, has been received, notwithstanding it was elicited by questions put by a police officer. (3) In like manner, the examination of a prisoner before a magistrate, consisting of answers to questions put by the magistrate, is receivable. (4)

Confession obtained by questions.

It was ruled in one case, by Holroyd, J., that the fact of a confession having been made by a person whilst in unlawful custody rendered it unavailing, but this doctrine cannot be considered as satisfactorily established. (5)

Confession during illegal custody.

(1) *Burley's case*, East, 7, 1818.  
(2) *Per Littledale, J.*, Warwick, Ass.

(3) *Rex v. Thornton*, 1 Mo. Cr. Ca. 27. The prisoner was a boy, fourteen years old, and the confession was made after he had been without food for nearly a whole day. The constable repeatedly told him that there was no doubt of his being guilty, and repeatedly asked him who was concerned with him. *Rex v. Shaw*, 6 C. & P. 373, questions by a fellow prisoner.

(4) *Rex v. Ellis, R. & M.* 432. See *Rex v. Wilson, Holt*, 597, *contra*, which, together with a case decided by Holroyd, J., were referred to. *Rex v. Bartlett*, 7 C. & P. 832.

(5) *Ackroyd & Warburton's case*, Lewin, 49. See *Thornton's case*, Lewin, 49. 1 Mo. Cr. Ca. 27, where the legality of the detention was considered doubtful, by Bayley, J. The following inducements have been held to invalidate confessions: Prosecutor stating, "that he only wanted his money, and if the prisoner gave him that, he might go to the devil if he pleased." *Rex v. Jones, R. & R. Cr. Ca.* 152.

A threat of committal to prison, *Rex v. Parratt*, 5 C. & P. 570. Prosecutor saying, "Unless you will give me a more satisfactory account, I will take you before a magistrate." *Rex v. Thompson, Leach*, 292. "I should be obliged to you if you would tell us what you know about it, if you will not, we, of course, can do nothing." *Rex v. Partridge*, 7 C. & P. 551, "You had better split, and not suffer for all of them." *Rex v. Thomas*, 6 C. & P. 353. "It would have been better, if you had told at first." *Rex v. Walkley*, 6 C. & P. 175, "It is of no use for you to deny it, for there is the man and boy who will swear they saw you do it." *Rex v. Mills*, 6 C. & P. 146. Where a prisoner desired another person to apply to a justice to admit him a witness for the crown, and at the same time states facts. *Hall's case, Leach*, 559, n. "Unless you give me a more satisfactory account, I will take you before a magistrate." *Thompson's case, Leach*, 292. Prisoner saying, "If you will give me a glass of gin, I

Caution by  
magistrate.

It does not appear necessary, in order to render the examination of a prisoner admissible in evidence against him, that he should be cautioned by the magistrate, not to expect any favor from making a confession, or, if any one has told him it will be better for him to confess, or worse for him if he does not, that he must pay no attention to it, and that any thing said by him against himself will be used against him at his trial. (1) It has, indeed, been frequently said, that it is the duty of the magistrate to use such cautions; but the propriety and expediency of such a course may be open to considerable question. It is at all events improper in the magistrate to dissuade a prisoner from making a voluntary confession. (2)

Inducement by  
whom.

Some rules may be collected from decisions of a recent period, with regard to the admissibility of confessions, where inducements of hope or fear have been offered to the prisoner by the prosecutor, by persons in authority, or by strangers. The principle of some of the decisions upon this subject appears to be, that an inducement, held out by a person having no authority, would not be likely to induce a prisoner to make an unfounded confession to such person, before whom he would be particularly cautious as to what he stated to his own disadvantage. Thus in *Rex v. Row*, (3) where some of the prisoner's neighbours, who had nothing to do with his apprehension prosecution or examination, had admonished the prisoner to tell the truth and consider his family, it was held, that a confession was receivable, on the ground that the advice to confess

will tell you all about it;" the offer coming from the prisoner. *Sexton's case*, *Chetw. Burn.*

The following inducements have been held, not to invalidate a confession: where a magistrate told a prisoner that his wife had confessed, and that there was quite case enough against him to send a bill before a grand jury. *Wright's case*, *Lewin*, 48. Where a prisoner, charged with arson, was told that there was a very serious oath laid against her, by a person

who saw her set fire to the rick. *Long's case*, 6 C. & P. 179. It seems that the confession of a person, admitted as King's evidence, may be received against him, if he refuse to give evidence on the trial of his accomplices. *Burley's case*, *Stark. Ev.* part iv.

(1) *Rex v. Magill*, *Macn.* 38, that the evidence is receivable, though no caution has been given.

(2) See per *Gurney, B.*, in *Rex v. Green*, 5 C. & P. 312.

(3) *R. & R. Cr. Ca.* 153.



was not given or sanctioned by any person who had any concern in the business. It is to be observed, that the advice was given to the prisoner when he was in the custody of a constable, who made no observation upon it, nor did the prisoner answer at the time, but he confessed to the constable in about an hour afterwards : and this case has been followed by other decisions to the like effect. (1) But where there is ground to suppose that the constable appeared to the prisoner to sanction, though tacitly, an inducement made in his presence, it appears to have been doubted, whether the evidence ought to be received. In the recent case of *Rex v. Pountney*, (2) a prisoner being in the custody of a constable upon a charge of felony, was taken by the constable to an inn, where innkeeper, in the hearing of the constable, held out an inducement to confess, whereupon the prisoner confessed in the constable's hearing. Mr. Baron Alderson received the evidence, observing, that he did so in deference to authorities, but that he entertained a strong opinion against it's admissibility, and that, if it had been necessary, he would have reserved the point for the opinion of the Judges. And, from a very recent case, it seems also to be matter of doubt, whether a confession is receivable in evidence, if it has been made to a person, in consequence of threats or promises held out by him, although he may have nothing to do with the apprehension, the prosecution, or the examination of the prisoner. (3)

(1) *Rex v. Gibbons*, 1 C. & P. 97. The confession was sometime after the inducement. *Rex v. Hardwick*, cited, *ib.* 98, n., where the inducement was held out by the constable's wife. *Rex v. Tyler*, 1 C. & P. 129. In *Rex v. Richards*, 5 C. & P. 318, the inducement was at an end, when the prisoner was delivered to the constable. A woman placed with a prisoner, by a constable, to prevent her escaping, is a person in authority for this purpose. *Rex v. Enoch*, 5 C. & P. 539.

(2) 7 C. & P. 303. It is to be observed, that the confession was made to the person who held out the inducement, and that the confession was not, as in *Rex v. Row*,

made to the constable, at an interval after the inducement, and in the absence of the party who held it out, consequently there do not appear to be any authorities requiring the reception of the evidence.

(3) In *Rex v. Spencer*, 7 C. & P. 776, Parke, B., said, that he would receive such evidence, but would reserve the point, as there was a difference of opinion among the Judges upon the subject. Simpson's case, 1 Mo. Cr. C. 412. The threats and promises were offered by, and the confessions made to, the mother of the wife of the prosecutor : *Rex v. Upchurch*, 1 Mo. Cr. Ca. 465. The promises were of-

Negating inducement by other persons.

For the purpose of introducing a confession in evidence, it is unnecessary, in general, to do more than negative any promise or inducement held by the person to whom the confession was made. (1) However, if there be any probable ground to suspect collusion in obtaining the confession, such a suspicion ought, in the first instance, to be removed. Where a constable, who had a prisoner in custody, left the room in which the prisoner was detained, and, upon another constable entering the room, the prisoner at once made a statement without any caution being given him, it was held necessary for the prosecutor to call the first constable, for the purpose of disproving any collusion. (2)

Inducement by person in authority. Subsequent caution.

Where an inducement has been held out by a prosecutor, or by a person in authority, it would seem, in general, that a subsequent confession to such persons, would not be receivable. (3)

Although an inducement has been held out by a prosecutor, constable, or other person, if the prisoner is afterwards taken before a magistrate, who forewarns him that what he says against himself, will be given in evidence against him, a confession made to the magistrate, after such caution, will be receivable. (4)

ferred by, and the confession made to, the wife, of the prosecutor. *Rex v. Dunn*, 4 C. & P. 543. *Rex v. Kingston*, 4 C. & P. 387, where the confession was made to a surgeon. *Rex v. Slaughter*, 4 C. & P. 544, n. It may happen under particular circumstances that a second confession to the same person, may be voluntary, though the first was not so.

(1) *Rex v. Clewes*, 4 C. & P. 223. It was said, to be fair in the prosecutor to call the person with whom the prisoner had previously conversed, who was a clergyman and magistrate.

(2) *Rex v. Swatkins*, 4 C. & P. 550. It was afterwards shewn that

the prisoner was not under any charge at the time, but that the first constable was detaining him as an unwilling witness, and the evidence was received.

(3) See *Rex v. Nute*, Chetw. Burn. Confession, 2 Russ. 648. *Rex v. Sexton*, *ib.* 2 East's P. C. 658. *White's case*, M. T. 1800.

(4) *Rex v. Howes*, 6 C. & P. 404. It does not appear whether generally a caution by a person will make a confession to him admissible, notwithstanding a previous inducement by himself or by a person of the same or inferior authority.

(5) *Rex v. Lingate*, Derby Lent Ass. 1815.

In a case, tried before Mr. Justice Bayley, (5) where it appeared that the prisoner, on being taken into custody, had been told by a person who came to assist the constable, that it would be better for him to confess, but that, on his being examined before the committing magistrate on the following day, he was frequently cautioned by the magistrate to say nothing against himself, a confession under these circumstances before the magistrate was held to be clearly admissible. In another case, it appeared that a constable told the prisoner, he might do himself some good by confessing; the prisoner afterwards asked the magistrate, if it would be any benefit to him to confess; on which the magistrate said, he could not say it would, and the prisoner then declined confessing; but afterwards, in his way to prison, he made a confession to another constable, and he confessed again in prison to another magistrate; the Judges were unanimous in holding, that the confessions were admissible in evidence, on the ground that the magistrate's answer was sufficient to efface any expectation which the constable might have raised. (1)

It is no objection to a confession before a magistrate, that the prosecutor, who was present, first suggested to the prisoner that he had better speak out, when the magistrate, or his clerk, immediately checked the prosecutor, desiring the prisoner not to regard him, but say what was proper. (2)

It has been held, that a caution by a magistrate was sufficient to render a confession receivable in evidence, notwithstanding there may have been some inducement before held out, to which the magistrate did not advert, and of which he may have been ignorant. (3)

(1) *Rex v. Rosier*, Easter Term, 1821, MS. *Rex v. Clewes*, 4 C. & P. 225, where the inducement was by a magistrate and clergyman, the caution by a coroner, and there was a letter from the Secretary of State refusing mercy.

(2) *Edwards's case*, East. Term, 1802.

(3) *Rex v. Howes*, 6 C. & P. 404.

The magistrate knew of the former confession, did not tell the prisoner that it would have no effect, but cautioned him generally. *Sexton's case*, Chetw. Burn. tit. Confessions. The confession was obtained by giving gin. The officer, to whom it was made, read it over before the magistrate, who cautioned the prisoner. And the prisoner said that

If a person of superior authority, as a magistrate, holds out an inducement to confess, a confession afterwards to a person of an inferior authority, as a turnkey, seems not to be admissible. Such a confession has been held not to be receivable, in a case where the inferior officer had not cautioned the prisoner. (1)

**Property found.** Though a confession may have been obtained by means of undue inducements, yet, if in consequence of the information obtained from the prisoner, property stolen is discovered, it is competent to give in evidence the fact that the property has been discovered conformably with the prisoner's information. The statement, as to his knowledge of the place where the property is to be found, being confirmed by the fact, is thus proved to be true, and not to have been fabricated in consequence of any inducement. It is competent therefore to inquire, whether the prisoner stated that the property would be found by searching a particular place or person, and to prove that it was found accordingly; but it would not be competent to inquire, whether the prisoner acknowledged that he had concealed the property. (2)

**Discovery of property. Contemporaneous expressions.**

Where inducements to confess have been held out, and the prisoner has, in consequence, delivered property to the prosecutor, it appears somewhat doubtful, whether the declarations of the prisoner accompanying the delivery of the property, and tending to identify it as belonging to the prosecutor, are receivable in evidence. It may be thought, that the only ground upon which such declarations can be received is,

it was the truth and signed the paper. See the preceding cases of *Rex v. Lingate* and *Rex v. Rosier*.

(1) *Rex v. Cooper*, 5 C. & P. 535. This decision follows *à fortiori* from the cases, according to which examinations before magistrates have been invalidated in consequence of previous inducements. It would seem that a confession, after caution by a person of equal authority with the person holding out the inducement, would be receivable, but this has not been expressly de-

termined.

(2) *Butcher's case*, Leach, 265, n. 2 East's P. C. 658. *Warwickshall's case*, Leach, 298, 300. *Lockett's case*, Leach, 386. *Morrey's case*, Leach, 265, n. *Rex v. Harvey*, 2 East's P. C. 638. *Rex v. Grant*, and *Rex v. Hodge*, 2 East's P. C. 658. It seems formerly to have been thought, that no part of the confession could be given in evidence, but only the actual discovery of the property.

that they are explanatory of the act of delivery, and not a narrative of a past transaction. In *Rex v. Griffin*, (1) a prisoner was charged with stealing a guinea and two promissory notes: after inducements to confess, it was held that the prosecutor might prove, not only that the prisoner brought him a guinea and a note, but that he also gave them up, as the guinea and one of the notes that had been stolen from him. But in *Rex v. Jones*, (2) when the prosecutor asked the prisoner for the money which the prisoner had taken out of his pack, and at the same time held out inducements to confess, whereupon the prisoner produced a sum of money, stating, that it was all he had left of it, it was held that this evidence ought not to have been received.

If a confession is improperly obtained, it is a ground not only for excluding evidence of the confession, but also of any act done in consequence by the prisoner towards discovering the property, the property not having been actually discovered thereby; for, as was observed by the Court, the influence which might produce a groundless confession, might also produce groundless conduct. Thus, where a prisoner was induced by a promise from a prosecutor to confess his guilt, and after that confession he carried the officer to a particular house, as and for the house where he had disposed of the property, and pointed out the person to whom he had delivered it; the person denied knowing any thing about it, and the property was never found: it was held, that the evidence of what passed between the prisoner and the officer ought not have been received. (3)

Acts done in  
consequence of  
inducement.

With respect to the prisoner's liability to be affected by the confessions of others, a marked distinction exists between the branch of law now under consideration, and that which has been considered in treating of admissions. Where two persons were indicted together, one for stealing and another

Confessions by  
another.

(1) R. & R. Cr. Ca. 151.

(2) R. & R. Cr. Ca. 152.

(3) *Rex v. Jenkins*. R. & R. Cr. Ca. 492. A confession, made in

consequence of a previous confession to another person, made under inducement, held not admissible in *Nute's case*, 2 Russ. 648.

for receiving, in which the principal pleaded guilty, and the receiver pleaded not guilty, Baron Wood refused to allow the plea of guilty to establish the fact of the stealing by the principal as against the receiver. (1) And in a recent case, the confession of the principal felon before a magistrate was held to be inadmissible against the receiver. (2)

Upon trials for treasonable and other conspiracies, several nice questions have arisen respecting the admissibility of statements made by co-conspirators. These have been adverted to in treating of the distinction between original and hearsay evidence. Such statements are receivable, when they are in the nature of, or when they accompany, acts for which all the parties concerned in the conspiracy are responsible; but they are not receivable, when they are in the nature of narratives, descriptions, or confessions. (3)

In former times it was usual to admit the confessions of prisoners, even of such as had afterwards been executed, as evidence against others, and this at a period when torture was not unfrequently applied in order to obtain confessions; as for example, upon the trials of Sir N. Throgmorton, the Earl of Essex, and Sir W. Raleigh, and upon the trials for the Gunpowder Plot. (4) One of the earliest reported instances of the change of practice occurs in the resolution of the Judges in *Tong's* case. (5)

It appears to be settled by late authorities, that where a con-

(1) Cited in *Turner's* case, 1 Mo. Cr. Ca. 348.

(2) *Turner's* case, 1 Mo. Cr. Ca. 348. The principal was alive, but the decision does not appear to have been founded on this circumstance. The point had not been previously settled. *Black's* case, 4 C. & P. 377.

(3) *Vide supra*, *Hardy's* trial, 24 Howell, 452, 475, where *Thelwall's* letter was considered to be a narrative merely.

(4) See also *Abingdon's* case, 2 Howell, 16. *Sir M. Foster's Discourses*, 234, where the prac-

tice is justly stigmatized. With regard to torture, see notes on *Fortescue, de laudibus legum Anglie*. *Jardine* on the use of torture in England. Prisoners were told, that the trial *per gentes de leur condition*, meant confessions of accomplices. In *Sir W. Raleigh's* case, *Sir E. Coke* says, that the *law presumes* a man will not accuse himself for the purpose of accusing another.

(5) Kel. 18, res. 5, tem. Car. 2. 6 Howell, 227. *Hevey's* case, Leach, 235.

fession, whether oral or in writing, by one prisoner implicates other prisoners by name, the confession must be proved according to the manner in which it was made, and the names of the prisoners implicated must be mentioned. On such occasions, it is the duty of the Judge to inform the jury, that the confession ought not to affect any one but the person who made it; a caution which, it may be feared, is too often unavailing. (1)

The statute of the 7 W. 3, c. 3, s. 2, enacts, "that no person shall be indicted, tried, or attainted, for high treason or misprison of high treason, but upon the oaths and testimony of two witnesses, either both of them to the same overt act, or one of them to one, and the other of them to another overt act of the same treason, unless the party indicted and arraigned shall willingly without violence in open Court confess the same." Mr. Justice Foster seems to have been of opinion, (2) that the legislature intended by this section to require two witnesses to the overt act in all cases, except where the prisoner confessed the treason upon his arraignment in open Court, and that to warrant a conviction there must be proof of the overt acts upon oath, not merely proof of the confession of the overt acts. "But," he adds, (3) "perhaps it may now be too late to controvert the authority of the opinion in 1716, in *Francia's case*, warranted as it hath been by later precedents." (4) The rule is now clearly settled. All the Judges, on a conference preparatory to the trial of *Francia*, (5) held, that a confession of the overt acts, if proved by two witnesses, is proper evidence to be left to a jury. The same construction of the statute was adopted in *Greg's case*, (6) by six Judges against two: in *Berwick's case*, (7) by Lord Chief Justice Willes and Sir Thomas Abney against the opi-

Confession in  
case of treason.

(1) *Hearne's case*, 4 C. & P. 215. *Clewes' case*, *id.* 225. *Fletcher's case*, *Lewin*, 107. *Hall's case*, *Lewin*, 110. *Foster's case*, *id.* *Rex v. Walkley*, 6 C. & P. 175. The practice has varied in this respect. See *Fletcher's case*, 4 C. & P. 250. The more modern practice has not been always approved of. *Barstow's case*, *Lewin*, 110.

(2) See *Fost. Disc.* 232, 240, 243.

*Willis's case*, *id.* 242. S. C. 8 St. Tr. 254, 255, fol. ed. S. C. 15 *Howell's St. Tr.* 622. *Smith's case*, *Fost.* 240, 243.

(3) *Fost. Disc.* 243.

(4) See *Fost. Disc.* 11 n.

(5) *Francia's case*, 1716. Mr. J. Burnett's MS. 1 East's P. C. 133. *Kelynge*, 18.

(6) *Greg's case*, 1 East's P. C. 134.

(7) *Fost. Disc.* 10.

nion of Mr. Justice Foster; and by the Judges in the commission, on the trial of the rebels in 1746. (1)

39 & 40 G. 3,  
c. 93.

If the overt act of high treason, alleged in the indictment, is the assassination of the king, or any direct attempt against his life or his person, it is plain from the provision of the statute 39 & 40 Geo. 3, c. 93, (which enacts, that in such cases the prisoner shall be tried according to the same order of trial and upon the like evidence, as if he stood charged with murder,) that a confession, proved by a single witness, will be sufficient to convict the prisoner. And the overt acts themselves may be proved by a single witness. In these cases, the rule of the common law is restored.

Proof of colla-  
teral facts.

In all cases of high treason, when the prisoner's confession is offered in evidence as confirmatory of the testimony of the witnesses, it is clearly admissible, though proved by a single witness. (2) And with regard to all facts merely collateral, which do not conduce to the proof of the overt acts, it may be laid down as a general rule, that whatever was evidence of them at common law, is still good evidence under the statute of William. (3) A confession, therefore, of such collateral facts is still admissible in evidence, though proved by a single witness.

Principle of  
the rule.

From the above-cited cases, it appears now to be an established rule, that a full and voluntary confession by the prisoner, of the overt acts charged against him, if proved by two witnesses, is of itself sufficient evidence to warrant a conviction. And, although Mr. Justice Foster suggests, (4) that "the rule, for admitting a confession against the prisoner, ought not to extend further than to a confession made during the solemnity of an examination before a magistrate, or before some person having authority to take it, when the party may be presumed to be properly upon his guard and apprised of it's danger," no distinction of this kind

(1) Fost. Disc. 11 n. (†) 1 East's P. C. 134.

(2) Willis's case, 8 St. Tr. 254, fol. ed. S. C. 15 Howell's St. Tr. 622. And see Crossfield's case,

26 Howell's St. Tr. 56, 57.

(3) Fost. Disc. 242.

(4) Fost. Disc. 243. 4 Black. Com. 356.



is to be found in the authorities before mentioned. On the contrary, in *Francia's* case the Judges resolved, that the confession would be evidence, whether made before a magistrate, or in the course of conversation. (1) And there appears to be no solid ground for such a distinction; as confessions are admissible in trials for high treason, precisely on the same principle which made them evidence at common law.

The observations of Mr. Justice Foster, on the subject of confessions in cases of high treason, relate to the effect of this sort of evidence, rather than to its admissibility. "Hasty confessions," he says, (2) made to persons having no authority to examine, are the weakest and most suspicious of all evidence. Proof may be too easily procured: words are often mis-reported whether through ignorance, inattention, or malice—it mattereth not to the defendant—he is equally affected in either case: they are extremely liable to misconstruction: and withal this evidence is not, in the ordinary course of things, to be disproved by that sort of negative evidence, by which the proof of plain facts may be and often is confronted."

## CHAPTER XIX.

### EXCLUSION OF SECONDARY EVIDENCE.

**T**HE law excludes such evidence of facts as from the nature of the thing supposes still better evidence behind in the party's possession or power. The rule has been expressed in terms, that the *best* evidence must always be given. (3) Other writers have stated it to be, that the law requires the highest proof of which the nature of the thing is capable. (4) But the precise import of the rule cannot, perhaps, be adequately com-

Rule of exclusion.

(1) See Burnett, J., MSS. cited, Howell, 108.  
 1 East's P. C. 113. Kelynge, 19. (3) B. N. P. 293.  
 (2) Fost. Disc. 243; and see 26 (4) Bacon, Ab. Ev. 662.

prehended without reference to it's application in various instances.

Principle of the rule.

The principle of the rule under consideration is founded on the presumption, that there is something in the better evidence which is withheld, which would make against the party resorting to inferior evidence, and that this may probably be the reason for withholding proofs which apparently would tend to strengthen his case. Although, in some instances, this presumption may not be very strong, yet the general effect of the rule is to prevent fraud, and to induce parties to bring before a jury the kind of evidence which is least calculated to perplex or mislead them. (1)

Rule explained.

The present rule is satisfied by the production of the best attainable evidence, leaving it to the operation of the rule which excludes hearsay, and to other rules, to narrow still further the admissibility of the proofs. In requiring the production of the best evidence applicable to each particular fact, it is meant that no evidence shall be received which is merely substitutionary in it's nature, so long as the original evidence is producible. To give an operation to the rule, the evidence tendered must itself indicate the existence of more original sources of information.

Substituted evidence.

Where there is no substitution of evidence, but only a selection of weaker for stronger proofs, or an omission to supply all the proofs capable of being produced, the rule is not infringed. If a deed or will, for example, is attested by several subscribing witnesses, the execution may be proved by one of them. (2) For the purpose of proving handwriting, it is not necessary to call the supposed writer himself. (3) Where a notice to

(1) See Gilb. Ev. 13. B. N. P. 293. See per Lord Tenterden. M. & M. 258, as to the imperfection of parol testimony concerning written instruments.

(2) B. N. P. 264. Even the examination of a deceased subscribing witness may supersede the necessity of calling a survivor. *Wright v. Tatham*, 1 A. & E. 3. See

*infra*, as to proof of marriage without the register, and as to proof of examinations before magistrates, by other persons than the magistrate or his clerk.

(3) On a Bank prosecution, it was not thought necessary to disprove the cashier's handwriting, by calling the cashier. *Hughes's case*, 2 East's P. C. 1002. *M. Guire's*

produce a letter, written by a plaintiff to a defendant, had been given, it was held that its contents might be proved by any person acquainted with them, although it was in the plaintiff's power to produce the clerk who wrote the letter. (1)

In prosecutions, where it is necessary to prove, that the act, with which the prisoner is charged, was done without the consent or against the will of some other person, (as, upon indictments for unlawfully killing deer, or taking fish,) it is not, in general, indispensably necessary to call that person as a witness on the part of the prosecution, in order to prove the negative, that he did not give his consent. (2)

Some misapprehension as to the nature and extent of the rule has been occasioned by the case of *Williams v. The East India Company*, (3) where the question was, Whether the defendants had put on board the plaintiff's ship some articles of a combustible and dangerous kind, without giving due notice of their nature to the master of the ship, or to any other person employed in its navigation. It appeared in evidence at the trial, that the goods were delivered by the officer of the defendants, with a written order to the plaintiff to receive them, in which order nothing was said as to their nature; that they were received by the chief mate of the plaintiff's ship, who had since died; and that no other person was present at the time of the delivery. It was further proved, by the captain of the ship and the second mate, that no communication had been made to either of them, nor, as far as they knew, to any other person on board. Upon this evidence, the plaintiff, who had to prove the negative, was nonsuited, on the ground, that he had not given the best evidence of the want of notice which it was in

*Williams v.*  
*E. I. Co.*

case, *ib.*, case of Bank prosecutions, R. & R. 378. In an early case it was thought necessary to disprove handwriting, by calling the party whose receipt had been altered. *Smith's case*, 2 East's P. C. 1000.

(1) *Liebman v. Pooley*, 1 St. 167. On an indictment for perjury, it is not necessary to call the clerk

who wrote the Jurat. *Rex v. Benson*, 2 Camp. 508. See 2 Burr. 1189.

(2) *Allen's case*, 1 Mo. Cr. Ca. 154. *Hary's case*, 2 C. & P. 458. At one time it appears to have been thought necessary to call the owner as a witness. *Rogers's case*, 2 Camp. 654.

(3) 3 East, 193, 201.

Best proof of  
negative.

his power to produce, by calling the company's officer, who delivered the articles on board. And the nonsuit was afterwards affirmed by the Court of King's Bench. "The best evidence," said Lord Ellenborough, in delivering the opinion of the Court, "should have been given, of which the nature of the case was capable. The best evidence was to have been had, by calling, in the first instance, upon the persons immediately and officially employed in the delivering and in the receiving of the goods on board, who appear in this case to have been the first mate, on the one side, and the military conductor, the defendant's officer, on the other; and though the one of these persons, the mate, was dead, that did not warrant the plaintiff in resorting to an inferior and secondary species of testimony, (namely, the presumption and inference arising from a non-communication to the other persons on board,) as long as the military conductor, the other living witness, immediately and primarily concerned in the transaction of shipping the goods on board, could be resorted to; and no impossibility of resorting to this evidence, the proper and primary evidence on the subject, is suggested to exist in this case." It is to be observed, that the evidence in this case which was received, was not secondary in its nature, inasmuch as it would have been admissible, notwithstanding what was said to have been the primary evidence had been produced, and it is difficult to consider upon what principle it could have been substituted for such primary evidence, in case of its failure in consequence of the death of witnesses. The case, therefore, appears to be one in which there was a failure of the proper measure of proof, and not a substitution of secondary for primary evidence. (1)

Quantity of  
evidence.

That the rule in question relates only to the quality, and not to the quantity or strength of the evidence, is further illustrated by the cases, in which it has been held, that the entries or hearsay statements of deceased persons are receivable in evidence

(1) On the subject of what is the proper measure of proof in cases similar to that in the text, see *Coster v. Reed*, 6 B. & C. 21. The strength of proof required

will depend materially on the facility afforded the opposite party for explanation or contradiction. Per Lord Tenterden, in *Rex v. Burdett*, 4 B. & A. 162.

notwithstanding the same facts might be proved by living witnesses. Though all information must be traced to its source, if possible, yet if there are several distinct sources of information as to the same fact, it is not, in general, necessary to shew that they have all been exhausted, before secondary evidence can be resorted to. Thus an entry made by a deceased collector is proof of the fact of the money having been paid, without calling the persons who paid it to him. (1)

One of the most ordinary occasions, to which the present rule is applicable, relates to the substitution of oral for written evidence. The qualifications, under which oral evidence may sometimes be received, notwithstanding the existence of written evidence, will be more particularly considered in the second part of this work; in the present place, it is only material to inquire, in what cases it is not allowable to substitute entirely the one for the other.

Oral evidence  
of writing.

First, then, oral evidence cannot be substituted for any instrument in writing, the existence of which is disputed and is material to the issue between parties, or to the credit of the witnesses, and which is not merely the memorandum of some other fact. One advantage, derived from the application of the rule to such cases, is, that the Court acquires a knowledge of the whole contents of the instrument, which may have an effect very different from a statement of a part. "I have always," says Lord Tenterden, "acted most strictly on the rule, that what is in writing shall only be proved by the writing itself; my experience has taught me the extreme danger of relying on the recollection of witnesses, however honest, as to the contents of written instruments; they may be so easily mistaken, that I think the purposes of justice require the strict enforcement of the rule." (2)

Writing the  
subject of dis-  
pute.

(1) *Middleton v. Melton*, 10 B. & C. 328. Per Parke, J., *id.* referring to *Barry v. Bebbington*. The rule as to the proof of instruments by subscribing witnesses, some of whom are dead, is otherwise, in consequence of the intervention of

another principle. See *Wright v. Tatham*, 1 A. & E. 3, and *infra*, p. 2.

(2) *Vincent v. Cole*, M. & M. 258. Queen's case, per Lord Tenterden, 2 B. & B. 287, and see the observations of Best, Ch. J., in *Strother v. Barr*, 5 Bing. 151.

## Letters.

It was decided in the Queen's case, (1) that it is not allowable, on cross-examination, in the statement of a question to a witness, to represent the contents of a letter, and to ask the witness, whether he wrote a letter to any person with such contents, or to the like effect; because the counsel might thus put the Court in possession of a part only of the contents of a written paper. And even if the witness acknowledges the letter to be in his handwriting, he cannot be questioned as to its contents, but the whole letter must be read in evidence. So, where the inquiry was as to the existence of allotments, made by inclosure commissioners in another mode, than in and by the execution of their award, it was considered that, if such allotments were made, they must be in writing, and therefore the minutes of the commissioners were the primary evidence of them, and no other evidence of such allotments could be given, until a search had been made after the minutes. (2)

## Allotments.

## Contracts.

Oral evidence cannot be substituted for any written conveyance or contract. (3) The written instrument in such cases may in some measure be regarded as the ultimate fact to be proved, especially where the question relates to the proof of deeds and negotiable securities; and the principal object of committing contracts of every kind to writing is the intention of the parties to preserve a memorial of them, more lasting and more authentic than oral testimony. Accordingly, a plaintiff is not permitted to recover in an action for use and occupation, or ejectment, where there is a written contract of tenancy, without producing it. (4) If it comes out upon cross-examination of the plaintiff's

## Terms of tenancy.

(1) 2 Br. & B. 286. *Crowley v. Page*, 7 C. & P. 790. *Vide infra*, Examination of Witnesses.

(2) *Bendyshe v. Pearce*, 1 Br. & B. 464. As to the point, whether a dying declaration, signed by the deceased, excludes oral testimony. *Vide supra*, *Dying Declarations*.

(3) B. N. P. 246, as to Wills. *Vide infra*, part 2, as to the admissibility of parol evidence, of what is termed suppletory matter, not varying the written terms. *Jeffery*

*v. Walton*, 1 St. 269.

(4) *Brewer v. Palmer*, 3 Esp. 213. *Fenn d. Thomas v. Griffith*, 6 Bing. 533. *Rex v. Inhabitants of Castle Morton*, 3 B. & A. 588, where the contract was lost, but was not stamped. *Rex v. Inhabitants of Rawden*, 8 B. & C. 708. *Dover v. Mestaer*, 5 Esp. 92. It is not sufficient to nonsuit the plaintiff, by the evidence of his witness, that there is an agreement, in writing, relative to the land. *Doe*

witnesses, that there is a written agreement, he must produce it; but if he makes out a *prima facie* case, without shewing that there was any written contract, the other party, if he relies on that written contract, must produce it; (1) otherwise the plaintiff might, on a mere assertion of the defendant, be nonsuited for the non-production of a written instrument, which, if it had been produced, might turn out not to apply to the contract in question.

Where the single fact of the occupation of land is in issue, such fact may be proved by payment of rent, declarations of the tenant, or other parol evidence sufficient to establish it, notwithstanding it appears that the holding is under an agreement in writing; (2) but where the question is not merely as to the occupation of land, but as to the person under whom it is held, if there be a written agreement shewing that fact, it must be produced. (3)

Fact of tenancy.

The same doctrine applies to every species of written contracts, as well as to contracts between landlord and tenant. (4) In an action for work and labor, when it is shewn that the work was commenced under a written agreement, the agreement ought to be produced, and the plaintiff cannot recover without it for extras; for the written contract might be of importance even with respect to the extra work, as furnishing some evi-

Work and labor.

Extras.

d. Wood v. Morris, 12 East, 237. Shearwood v. Pearson, 12 East, 239. Per Park, J., 5 Bing. 150.

(1) Rex v. Padstow, 4 B. & Ad. 210. Fenn d. Thomas v. Griffith, 6 Bing. 533. Fielder v. Ray, 6 Bing. 332, where plaintiff proved a contract by parol, and it was held that he could not be nonsuited by the defendant producing an unstamped written agreement. Per Littledale, Reed v. Deene, 7 B. & C. 266. Stephens v. Pinney, 8 Taunt. 327, where the defendant had neglected to give the plaintiff notice to produce. Per Bayley, J., Rex v. Rawden, 8 B. & C. 708.

(2) Rex v. Holy Trinity, Hull, 7 B. & C. 611. Strother v. Barr, 5 Bing. 136, commented on in Doe

v. Harvey, 8 Bing. 241.

(3) Doe v. Harvey, 8 Bing. 241. In Strother v. Barr, 5 Bing. 136, the Court of Common Pleas were divided upon the question, whether, in an action for injury to the reversion, it is competent to prove the occupier's holding by parol, when he holds under a written agreement. See Cotterill v. Hothy, 4 B. & C. 465.

(4) Policies of insurance, Rex v. Gilson, R. & R. 138. Rex v. Dovan, 1 Esp. 127. The policies were held to be better evidence than the books of the insurance office. Resolution of Committee, in an action by Secretary Whitford v. Tutting, 10 Bing. 395.

dence between the parties as to the rate, at which the work should be paid for. With respect to the Judge, in such a case, looking at an unstamped agreement, in order to see, whether it referred to the items, claimed to be received independently of it: Lord Tenterden observed, that such a practice would be attended with too much inconvenience. (1)

Collateral writing.

Where, however, a written communication or agreement between parties is collateral to the question in issue, it need not be produced; as, where the writing is a mere proposal, which has not been acted upon, (2) or where, during an employment under a written contract, a separate order is given by parol, (3) or where the action is not in the form of assumpsit upon the agreement, but in tort for the conversion of it. (4)

Written substituted evidence.

The questions, usually occurring in practice, relate to the reception of oral testimony; but the principle of the rule equally applies to the substitution of testimony which is written. Thus, on the trial of a person charged with having wilfully, with intent to injure an insurance company, set fire to a house, which he had insured at the company's office, it was held not allowable to prove the insurance by the books of the company, without giving the prisoner a regular notice to produce the policy. (5)

(1) *Vincent v. Cole*, M. & M. 258. *Rex v. Pendleton*, 15 East, 449.

(2) *Doe d. Bingham v. Cartwright*, 3 B. & A. 326. *Dalisen v. Stark*, 4 Esp. 163. *Stevens v. Pinney*, 8 Taunt. 328. *Hawkins v. Warr*, 3 B. & C. 698. *Wilson v. Bowie*, 1 C. & P. 8. *Ramsbottom v. Tunbridge*, 2 M. & S. 434, signed paper delivered by auctioneer. *Edgar v. Blake*, 1 St. 464, a prospectus. *Ingram v. Lea*, 2 Camp. 521, order for goods.

(3) *Reed v. Battie*, M. & M. 413.

(4) See *Bucher v. Jarret*, 3 B. & P. 143. *Jolly v. Taylor*, 1 Camp. 143. *Davis v. Reynolds*, 1 St. 115. *How v. Hall*, 14 East, 274. *Doe*

*d. Wood v. Morris*, 12 East, 237. *Shearwood v. Pearson*, *ib.* *Per Park, J.*, 5 Bing. 150. *Dover v. Mastaer*, 5 Esp. 92. So where the foundation of the action is a written security, but the immediate demand is for monies received. *Bayne v. Stone*, 4 Esp. 13. See *Ingram v. Lea*, 2 Camp. 521. In trover for a written document, the plaintiff may prove the description of the document by secondary evidence, though the defendant offers to produce it. *Whitehead v. Scott*, 1 M. & Ro. 2.

(5) *Rex v. Doran*, 1 Esp. 127. *Rex v. Gibson*, R. & R. 138.



So, if it should be material for a plaintiff, in reply to the case of the defendant, to prove the contents of a registered deed, which is in the defendant's possession, the memorial of the deed would not be admissible for that purpose, unless there had been previously a notice given to the defendant to produce the original; (1) and numerous other examples occur to the like effect. The rule has reference to the substitution of evidence, whether it be of the same or of inferior degree. (2)

Where the law requires an entry to be made in a Court of Justice of particular transactions, the official entry excludes all independent evidence of the transaction. Thus, parol evidence was held not admissible to prove the taking of oaths required by the Toleration Act, as the fact would be recorded in the Court where the oaths were taken. (3) In like manner, parol evidence is not admissible of the day on which a cause came on to be tried, as it is capable of proof by matter of record. (4) Upon a question whether the Abbey de Sentibus was an inferior abbey, or not, Dugdale's *Monasticon* was refused, because the original record was to be found in the Augmentation Office. (5) And it has been seen that even an admission of a party does not supersede direct proof of matter of record, by which it is sought to affect him. (6)

Where an official memorandum, not strictly of record, is required by law to be made, of the particulars of any statement, all evidence, in substitution of such memorandum, is, in general to be excluded. (7) Thus, no parol evidence can be

Matter of record.

Official memorandum.

Prisoner's examination.

(1) *Molten. q. t. v. Harris*, 2 Esp. 548, and see *Underhill v. Watts*, 3 Esp. 56.

(2) It would seem that there were no degrees of secondary evidence, *Brown v. Woodman*, 6 C. & P. 206; but see *Rex v. Castleton*, 6 T. R. 236. B. N. P. 254. *Liebman v. Pooley*, 1 St. 167, that a copy of a copy is not the best secondary evidence.

(3) *Rex v. Hube, Peake*, 131. The same doctrine applies to the proceedings of Courts which are not of Record, and apparently to

the proceedings of inferior Courts, of which written memorials are preserved, *vide infra*, part 2.

(4) *Thomas v. Ansley*, 6 Esp. 80. *Rex v. Page*, *ib.* 83; and see *Phillips's case*, R. & R. 369.

(5) *Salk.* 281.

(6) *Vide supra*, *Scott v. Clare*, 3 Camp. 236.

(7) The rule in the cases about to be noticed seems more rigid than in regard to the proceedings of Courts before mentioned, which are allowed to be proved by examined copies.

given of a prisoner's confession before a magistrate, whilst he is under a charge of felony or misdemeanor, unless it be first proved, that the confession was not taken down in writing, pursuant to the provisions of the statute 7 Geo. 4, c. 64. (1) It will be presumed, until the contrary is shewn, that the prisoner's examination has been taken down in writing, in conformity with the statute. (2) It has been thought, in some cases, that after the production of the prisoner's examination in writing, it is competent to prove by parol any thing which the prisoner may have said before the magistrate, in addition to what appears in the written examination, on the ground, apparently, that such evidence is not in substitution of any thing which is in writing. (3) But as such parol statements may materially affect the written examination, and as they are liable to considerable suspicion, from the circumstance of their not having been taken down by the magistrate, they ought to be received with the greatest caution. (4) A written examination will not exclude a parol confession, made previously to the prosecutor or other person than the magistrate. (5)

**Informal examination.**

Where the confession of a prisoner before a magistrate has been taken down in writing, but the written examination is informal, in consequence of not being signed, or being signed before the evidence was concluded, or not being properly headed, or from some other cause of informality, there is no longer any

(1) *Rex v. Hall*, cited in *Rex v. Lambe*, Leach, 635. 1 Hale, 284. *Rex v. Lewis*, 6 C. & P. 161. The rule does not apply to examinations before magistrates on summary convictions, which are not required to be taken down in writing. *Rex v. Edmunds*, 6 C. & P. 164.

(2) *Rex v. Jacobs*, Leach, 349. *Rex v. Hickman*, *ib.* *Rex v. Fisher*, *ib.* *Rex v. Hall*, *ib.* *Rex v. Fearshere*, *ib.* B. N. P. 298. Hawk. c. 46, s. 43. *Phillips v. Wimburn*, 4 C. & P. 273.

(3) *Rex v. Harris*, Mo. Cr. Ca. 338. See *Rowland v. Ashby*, R. & M. 231. In *Rex v. Spilsbury*, 7 C. & P. 188, parol evidence was given of what the prisoner said while the witnesses were under examination,

and which was not taken down, not being part of his defence.

(4) In *Rex v. Lewis*, 6 C. & P. 162, in which *Rex v. Harris* was cited, Gurney, B., refused to receive similar evidence. In *Rex v. Rivers*, 7 C. & P. 177, parol evidence was refused, but the examination purported to have been sworn, and the magistrate's signature was held to be conclusive of this fact. In *Rex v. Walter*, 7 C. & P. 267, the magistrate returned that the prisoner said, "I decline to say any thing." After which, Lord Abinger refused to hear parol evidence of a confession made before the magistrate.

(5) *Rex v. M'Carty*, Macn. 45.

ground for excluding parol evidence ; for the parol evidence is in such cases adduced, not in substitution of the official document, but according to it's effect at common law. (1) The informal examination may, like any other contemporaneous document not of an official character, be used to refresh the memory of a witness who was present. (2) This subject will be more particularly considered in the second part of the Work, in which the proof of examinations is treated of in conjunction with the proof of other written evidence.

Although a parish register is required by law to be made of all marriages, the fact of a marriage may be proved by the testimony of the persons who were present at it, or by general representation. (3) It will be seen, in the second part of this Work, that various public documents are of a nature to

Fact of marriage.

(1) Vide *infra*, part 2, *Proof of Examinations*. Examinations not signed, *Rex v. Telicote*, 2 St. 483. *Foster's case*, *Lewin*, 46. *Hirst's case*, *ib.* *Rex v. Pressly*, 6 C. & P. 183. Not signed, but acknowledged to be true, *Lambe's case*, 2 Leach, 625. Not read over, signed with a mark, or not signed, and not proved to have been read over by the magistrate, or by his clerk. *Rex v. Chappel*, M. & Ro. 395. *Rex v. Richards*, and *Rex v. Hope*, *ib.* 396, n. 7 C. & P. 136. *Rex v. Taylor*, *ib.* 138, n. *Rex v. Foster*, 7 C. & P. 148. *Rex v. Reading*, 7 C. & P. 649. 2 Hale, ch. 38, ch. 7, p. 52, Informal heading, *Rex v. Bently*, 6 C. & P. 148. *Rex v. Tarrant*, 6 C. & P. 182.

(2) *Layer's case*, 16 Howell, 214. *Rex v. Tarrant*, 6 C. & P. 182. *Rex v. Pressly*, 6 C. & P. 183. *Hirst's case*, *Lewin*, 46. *Jones's case*, Carr. 13. *Dewherst's case*, *Lewin*, 47. *Rex v. Bell* 5 C. & P. 163, where *Rex v. Fagg*, 4 C. & P. 566, was overruled. A case before Lord Lyndhurst, cited 5 C. & P. 164, n. *Rex v. Reason* and *Tranter*, 1 Str. 499. *Rex v. Watkins*, 4 C. & P. 550, n. *Rex v. Reed*, 1 M. & M. 163. See *Rex v. Lewis*, 6 C. & P.

163. A confession written by a constable, and signed with the prisoner's mark, was read by the officer of the Court, 4 C. & P. 548. It would seem that in *Lambe's case*, 2 Leach, 625, the examination, which was read over to the prisoner and acknowledged by him to be true, but was not signed, and was afterwards allowed to be read by the officer of the Court, was not received on the ground of it's being an official document. It has, however, been frequently so considered. See *Thomas's case*, *ib.*

(3) *Evans v. Morgan*, 2 Cr. & J. 453. B. N. P. 247. *Allison's case*, R. & R. 109. *Burt v. Barlow*, Doug. 172. *Rex v. St. Devereux*, 1 Bl. 367. *Read v. Passer*, Peake, 305. Nor is the evidence of the attesting witness required to prove the handwriting of the parties in the register, Doug. 174. But an entry of a marriage in a day-book is not admissible in evidence, if the entry has been afterwards made in the register. *May v. May*, Str. 1073, and see *Doe d. Warren v. Bray*, 8 B. & C. 813. The register is not of a judicial nature, and relates to a fact, and not to expressions merely.

exclude independent evidence, whilst others do not produce this effect.

Living person  
not produced.

The substitution of the hearsay of a person, not produced, as a witness, in the place of his testimony, falls obviously within the principle of the rule under consideration. It has been seen, that even in cases where hearsay evidence is admissible, it is required, in deference to the rule which excludes secondary evidence, that it should be shewn that the person, whose hearsay is adduced, is deceased. In like manner, it will be seen, that depositions are not receivable, whilst the parties who made them are alive, or at least producible for the purpose of giving evidence. (1)

Admissions by  
living persons.

The evidence of the admissions of living persons may be considered, in many instances, rather as not falling within the rule, than as exceptions to it. In many cases, in which it would be competent to call as witnesses the persons making admissions as witnesses, and where, though they have the option to give evidence or not, no objection might be made by them, the evidence of the admission would generally not be superseded in its effect, by the testimony of the person who made it. The admissibility of a parol admission of the contents of a written document stands upon a different footing, and cannot be considered as completely settled by the authorities. (2) In other cases, the admissions, though in the nature of substitutionary evidence, appear receivable on the ground that a person's own expressions and actions ought to be allowed, as against himself, to raise a *prima facie* presumption of the truth of facts which those expressions and actions imply.

(1) See *infra*, part 3, *Examination of Witnesses*, as to the necessity of interrogating a witness, as to his acts and declarations previously to calling other witnesses to discredit him. As to the causes of absence, which are equivalent to the death of witnesses for the present purpose, *vide infra*, part 2. To prove damage in discontinuing trade, the

customers must be called to give evidence of their motives. *Talk v. Parsons*, 2 C. & P. 201. With respect to answers made to inquiries, see *Rex v. Denis*, 7 B. & C. 621. *Rex v. Morton*, 4 M. & S. 49. *Rex v. Castleton*, 6 T.R. 236.

(2) *Vide supra*, "*Admissions*." As to the admission of marriage superseding direct proof of it. *Ib.*

The rule applies not only to the evidence produced in a cause, but also to such writings as a witness may use to refresh his memory; and therefore, where a contemporaneous entry has been made, it seems that a copy of such entry made at a subsequent period is not admissible for the purpose of refreshing a witness's memory. (1)

Refreshing  
memory.

It is an established rule, that where there are duplicate originals, all the originals must be accounted for, before secondary evidence can be given of any one. (2)

Where a writing is not the fact itself to be proved, and not made an appropriate instrument of evidence by private compact, nor required by law, there is no ground for its excluding oral or other evidence. It often happens that an oral communication is accompanied by one in writing to the same effect, yet the oral communication may be received, provided it be not adduced to prove the contents of the writing and in substitution of it, but as independent evidence. Thus, the payment of money may be proved by oral evidence, though a receipt be taken. (3) Where there is both a verbal and written notice to deliver up property, it is not necessary that the written notice should be produced. (4)

Writings not  
excluding oral  
evidence.

Where a written statement cannot be received on the ground of its being in the nature of hearsay evidence, or for want of a stamp, there is still less reason for prohibiting the substance of it from being proved by independent testimony. Thus it has

(1) Per Patteson, J., in *Burton v. Plummer*, 2 A. & E. 344. *Jones v. Stroud*, 2 C. & P. 196. *Doe v. Perkins*, 3 T. R. 749.

(2) Per Parke, B., in *Alwin v. Furnival*, 1 Cr. M. & R. 292.

(3) *Rambert v. Cohen*, 4 Esp. 213.

(4) *Smith v. Young*, 1 Camp. 439. It has been held, that a witness, on cross-examination, may admit not having mentioned a fact in an examination before commissioners of bankrupt, but that he might ask for the written examination if he chose. *Ridley v. Gyde*, 1 M. & Ro. 197. As to dying decla-

rations taken down in writing, *R. v. Gray*, 7 C. & P. 231, *vide infra*, that a confession taken down by a constable, and signed by a prisoner, is to be read by the officer of the Court, not so an informal examination before a magistrate though signed. Where a writing is signed by the party to be affected by it, it would seem that although the writing was a thing itself to be proved, and not merely evidence, yet that a previous or contemporaneous oral declaration would not necessarily be excluded, where it is not in substitution of the written evidence.

been seen, an informal examination taken before a magistrate will not exclude oral evidence of what a prisoner has stated. For although the witness is allowed to refresh his memory by reading the examination, he is supposed, in notion of law at least, to speak from his memory independently of the written paper. Where a witness read over to the defendant an account in writing, which was signed by the defendant, but which could not be used in evidence for want of a receipt stamp, the witness was allowed to refresh his memory by the inspection of the account, and to prove that he called over the items to the defendant, and that the defendant admitted them to be correct. (1) In the same manner, what a party says admitting a debt is evidence, notwithstanding the promise to pay is reduced into writing. (2)

Resolutions at  
a meeting.

Paper deliver-  
ed by prisoner.

Inscriptions.

In the prosecution of *Hunt* for a conspiracy, (3) the Court of King's Bench determined, that a paper, which had been delivered by the defendant to a person present at a meeting, as a copy of certain resolutions about to be proposed and read, and which was proved to correspond with the resolutions afterwards proposed, was properly received at the trial as evidence of those resolutions; without proof of any previous notice to the defendant to produce the paper from which the resolutions were supposed to be read. This paper was considered, as against the party himself to whom it applied, to be fully as good evidence as any that could be produced. In the same case, (4) the Court of King's Bench held, that inscriptions on flags and banners, which had been exhibited to public view, might be proved by eye witnesses, speaking to what they had seen on the occasion; and though it appeared that the flags had been seized and taken away by police officers, (so that they might have been produced,) the evidence was not considered on this account to be less competent; such inscriptions

(1) *Jacob v. Lendsey*, 1 East, 461; and see *Dalison v. Stark*, 4 Esp. 163. In *Maugham v. Hubbard*, 8 B. & C. 14, a witness called to prove the payment of money was allowed to refresh his memory by an unstamped receipt signed by himself.

(2) *Singleton v. Barrett*, 2 C. & J. 369.

(3) *Rex v. Hunt*, 3 Barn. & Ald. 568, 572. See also *Watson's case*, 32 Howell's St. Tr. 68, 83, 256, 257.

(4) *Rex v. Hunt*, 3 Barn. & Ald. 574.

are, as the Lord Chief Justice observed, the public expressions of the sentiments of those who bear them, and have rather the character of speeches than of writings. It may be observed, that the oral testimony was in this case adduced for the express purpose of representing accurately the contents of the writing, and therefore might seem to fall directly within the principle which excludes secondary evidence.

Whether resolutions, which have been proposed at public meetings, may be primarily proved by the parol evidence of witnesses, when the person proposing the resolutions appeared to read them from a written paper, was a point much discussed in the prosecution of Dr. Sheridan and Kirwan, in Ireland, (1) who were tried for an offence against the 'Irish Convention Act. The indictment began with averring that divers persons had assembled together, and intending to procure the appointment of a committee of persons, (of a particular description, and for a specific object,) entered into certain resolutions respecting such committee, the purport and effect of which resolutions were set out at length; the indictment then proceeded to charge Dr. Sheridan with certain acts done by him for the purpose of assisting in forming such committee, and for carrying into effect the resolutions before-mentioned. To prove the first averment, the counsel for the prosecution called a witness, who stated, that at a general meeting (at which it was admitted the defendants were not present,) the secretary of the meeting proposed a resolution, and read it from a paper. The proposition was seconded; the secretary then handed the paper to the chairman, and the chairman read it. The witness was then asked, "What was the resolution?" This question was objected to, on the ground, that the absence of the writing itself should be accounted for, before any parol evidence of its contents could be received. After a very full argument, a majority of the Court were of opinion, that this was not a case to which the distinction between primary and secondary evi-

Resolutions  
read, proved by  
parol.

(1) 1811. 31 Howell's St. Tr. 672, and see *Rex v. Moors*, 6 East, 420, n. In the case of printed documents, all the impressions are

originals, and are evidence against a person who adopts the printing by taking away copies, *Watson's case*, 2 St. 130.

dence was strictly applicable. That the proposed evidence was intended to shew, not what the paper contained, but what one person proposed and what the meeting adopted; in short, to prove the transactions and the general conduct of the assembly; and that such evidence could not be rejected, because some person present took notes of what passed. The form in which the argument was presented by the Solicitor General, was more striking:—"A number of persons," he said, "assemble and confer together—they agree to a certain resolution. If it be necessary to prove such a transaction in a criminal trial, would the prosecutor be bound to produce the resolution in writing? Would the prosecutor be bound by the manner in which it was taken down by one of the confederates? If the paper, supposed to contain the resolution, were produced, would that preclude the prosecutor from giving evidence of other matters which took place? Or suppose, further, that the matter were reduced to writing in such a way as to avoid a criminal imputation, although every sentence of the debate or conversation were criminal, would the prosecutor be bound by the former, and precluded from giving evidence of the latter?"

**Exceptions.**

**Records.**

**Entry in public books.**

Some exceptions to the rule excluding secondary evidence require to be noticed. Where it is necessary to prove the contents of any record, or of proceedings of a Court of Justice, or of entries in Court Rolls, or in public books or registers, it is sufficient to produce an examined copy. (1) This is on a principle of general convenience, and because it is apparent, that if the contents were misrepresented, there would be obvious means of exposing the fraud or error. (2)

**Proof of public officer:**

It is not, in general, necessary to prove the written appointments of public officers; for this would be attended with general inconvenience, and a strong presumption arises from the

(1) *Vide infra*, part 2. This doctrine would seem not to apply to the case of every official memorandum, and perhaps not to every species of public record; but it appears to embrace the proceedings of all Courts, whether supe-

rior or inferior, and whether of record or not. It will be seen that the like documents may sometimes be proved by office copy, or copy by authorized officer.

(2) *Vide*, part 2, proof of judicial and other public documents.



exercise of a public office, that the appointment to it is valid. (1) The cases upon this subject sometimes appear to be governed by the doctrine of admissions, but it will be seen, by the examples, that the exception is of a more extensive nature. In the case of all peace-officers, justices of the peace, constables, &c. it is sufficient to prove, that they acted in these characters, without producing their appointments. (2) And in the case of officers of any branch of the revenue, where the question is whether they are such, proof of being reputed to be so, or of having exercised the office, is good evidence of the fact, on any indictment, information, action, or prosecution. (3) On an indictment for perjury, committed by the defendant before a surrogate in an Ecclesiastical Court, proof that the person, who administered the oath, acted as surrogate, has been held to be sufficient *prima facie* evidence of his appointment and authority. (4) On a like indictment, an affidavit, purporting to be sworn before a public commissioner, was held admissible, without proof of the commission, on the ground that a commissioner for taking affidavits was a person acting as a public officer. (5) And proof of a person's acting as under-sheriff is sufficient proof of his authority to do any act necessary in the course of the office; as, for instance, to make an assignment of a lease, under an execution, in the name of the sheriff. (6) The like proof was held sufficient on the part of a plaintiff of his being vestry-clerk; and the rule was said to extend to all public officers. (7)

2. Proof of  
public officer.

Revenue  
officer.

Surrogate.

Under-sheriff.

Vestry-clerk.

(1) The rule has been held, in Equity, not to apply to a tithe-collector, as acting under a private authority. *Short v. Lee*, 2 Jac. & W. 468. Nor to assignees of a bankrupt, *Pasmore v. Bromsfield*, 1 Stark. Ca. 296. As to the agency of a person signing notes for the Bank, *Rex v. Bigg*, 3 P. Wms. 427. In *Rex v. Jones*, 2 Camp. 131. A letter purporting to come from the Lords of the Treasury was read, the only evidence of their acting being the letter in question.

(2) By Buller, J., in *Berryman v. Wise*, 4 T. R. 366. By the opinion of all the Judges in the case of the Gordons, tried for murder in 1789, *Leach's Cr. C.* 585. *Rex v. Shelley*,

381, n.

(3) St. 26 Geo. III. c. 77, s. 13, st. 26 Geo. III. c. 82, s. 6; and see st. 11 Geo. I. c. 30, s. 32.

(4) *Rex v. Verelst*, 3 Camp. 432. *Rex v. Creswell*, Lond. Sitt. after Mich. 1816, S. P.

(5) *Rex v. Howard*, 1 M. & Ro. 187.

(6) *Doe dem. James v. Brawn*, 5 Barn. & Ald. 243.

(7) *M'Gahey v. Alston*, 2 M. & Wel. 211. The same has been held by Lord Tenterden, as to a clerk of trustees under a turnpike act. The rule would seem to prevail even in actions for libel. Per Parke, B., *ib.* 209. Per Tindal, Ch. J., in *Cannel v. Curtis*, 2 Bing.

Voluminous  
facts.

The rule of exclusion has been relaxed in some cases where the evidence is the result of voluminous facts, or of the inspection of many books or papers, the examination of which could not conveniently take place in Court. Thus a witness may be asked as to a practice of accepting bills drawn in a particular manner, without producing the bills. (1) In this case Lord Ellenborough observed, that parol evidence might be received of one unvaried mode of dealing between parties by means of bills of exchange; but that if the mode of dealing varied, the bills must be produced. So a witness may give evidence of a general balance of accounts. (2) A witness may be interrogated as to his examination of old records, and may state that they correspond in substance with a particular record which has been read, without going through the whole in detail, subject however to a full cross-examination. (3) Where the question is as to the solvency of a party at a particular time, a witness may speak to the general result of his inquiries, as derived by the accounts rendered by a bankrupt of his affairs. (4)

*Voire dire.*

It has been already noticed, that the rule is not in general enforced upon examinations on the *voire dire*, owing to the peculiar circumstances under which those examinations take place; but that it prevails where an inquiry is made for the purpose of disqualifying a witness on the ground of infamy, in consequence of a previous conviction, which is capable of being proved by matter of record. Notices of the dishonor of bills, notices to quit, and attorney's bills of charge delivered under the statute, may be proved by secondary evidence, without giving a notice to produce or shewing the loss of the original evidence. (5)

Notices.

N. C. 234. For the cases, where the acting in a particular capacity is proof against a party by way of admission, *vide supra*, p. 369.

(1) *Spencer v. Billing*, 3 Camp. 310.

(2) *Roberts v. Doxen, Peake*, 83. In *Furness v. Cope*, 5 Bing. 114, a bankrupt's ledger was received, to prove that a person had no funds in the bank, without calling the

clerks who made the entries.

(3) *Rowe v. Brenton*, 3 M. & R. 212.

(4) *Assignees of Meyer v. Selton*, 2 St. 274. It was observed by Holroyd, J., that the like evidence had been received by Lord Kenyon, as from the nature of the case, such an inquiry could not be made in Court.

(5) Notice of dishonor, *Kine v.*

Where the production of evidence indicates the existence of other evidence of a more original character, still if it can be shewn that the better evidence is not attainable, the principle of the rule will not apply. (1) With respect to the proof of documents, it is, in general, permitted to give secondary evidence of them, where they are destroyed or lost, or where they are in the possession of an adversary who refuses to produce them, or are not available, in consequence of some reason of public policy, or of consideration for the interests of witnesses. This subject involves several subordinate questions of great practical importance, as, for example, the necessary search after documents, and the due notice to produce them; which will be more particularly considered in treating of written evidence.

Original evidence not available.

Missing documents.

With respect to the case where the more original evidence consists in the testimony of an individual, the practical questions chiefly occur in regard to the absence of attesting witnesses, or of persons who have made depositions. Where there is not sufficient proof that the parties are dead, some difficulty often arises as to whether any, and what, causes of absence shall be sufficient to allow of the admission of secondary evidence. The search after absent witnesses is another point of considerable practical importance. These matters will be more particularly considered in treating of written evidence, in which part of the work it will also be more convenient to examine the cases where the proof of documents by attesting witnesses may be dispensed with, from various other causes, besides that of not being able to procure their attendance. It may be proper, however, to observe in this place, that where it is proposed to discredit a witness, in which case it is proper to give him an opportunity of explaining his own acts and declarations previous

Absent witnesses.

Beaumont, 3 Br. & B. 288. Attorney's bill, *Colling v. Treweek*, 6 B. & C. 395. It is not necessary that such notices should be proved by duplicate originals, or contemporary copies, *ib.* *Ackland v. Pearce*, 2 Camp. 601. If a notice to quit be attested, the attesting witness must be called, *Doe v. Durnford*, 2 M. & S. 62. Such

notices are usually proved by duplicate originals, or, at least, by examined copies.

(1) Inscriptions on walls and fixed tables do not admit of being proved, otherwise than by secondary evidence, *Doe d. Coyle v. Cole*, 6 C. & P. 360. *Rex v. Fursey*, 6 C. & P. 81.

to proving them by other witnesses, (such inquiry not being irrelevant to the issue,) it is necessary to examine the witness sought to be discredited as to these matters, in the first instance, notwithstanding his answers would tend to criminate himself. (1)

Where original evidence is not available, many questions have arisen, as to what shall be deemed sufficient secondary evidence. These questions usually occur in the proof of documents, and will therefore be more conveniently treated of in the second part of the work. (2)

## CHAPTER XX.

### ON PRESUMPTIVE EVIDENCE.

**I**N the preceding chapters we have considered the various rules for the exclusion of evidence: we now proceed to treat more particularly of the quality of evidence. Where a fact is not of a nature of which a Court will take judicial cognizance, it is sometimes proved by the immediate inspection of a jury, but more frequently by the actual witnesses of it, and occasionally, under the limitations which we have noticed, by hearsay or secondary evidence. It is proposed, in the present chapter, to treat of the quality of the evidence in cases where the facts, to be proved by any of the above means, are not the precise facts in issue, but where the jury arrives at a conclusion, upon the points submitted to them, by an act of reasoning. The evidence in such cases is said to be presumptive. In the first section will

(1) The Queen's case, 2 Br. & B. 313. See *Edmunstone v. Webb*, 3 Esp. 244. *Vide infra*, part 3, *Examination of Witnesses*.

(2) To the same part of the work belong the questions, whether particular documents are the best, or secondary evidence. A counter-part is original evidence, *Burleigh v. Stubbs*, 4 T. R. 465. *Roe v. Davis*, 7 East, 363. *Paul v. Meek*,

2 Y. & J. 116. A machine not copy, *Nodin v. Murray*, 3 Camp, 228. *Rex v. Watson*, 2 St. 129, n. *De Beringer's case*, *ib.* *Holland v. Reeves*, 7 C. & P. 36. As to post-marks and marks of double postage, *Rex v. Plumer*, R. & R. 264. As to duplicate originals, see per *Bayley, J.*, in *Colling v. Treweek*, 6 B. & C. 398.

be considered the presumptions of ordinary occurrence, which are usually made by Courts and juries ; and in the second, the relevancy of presumptions will be treated of.

## SECTION I.

*Presumptions made by Courts and Juries.*

“ A presumption of fact,” says Lord Tenterden (1) “ is, properly, an inference of that fact from other facts that are known ; it is an *act of reasoning*. It is chiefly in those instances, where a sanction has been given by the Judges, to inferences, which a jury are to draw in particular cases, and which are called presumptions of *law*, that presumptive evidence becomes a subject of legal science ; nevertheless it may be useful to advert to some authorities respecting presumptions in general, whether of fact or of law.”

In drawing an inference from facts proved, regard must always be had to the facility that appears to be afforded for explanation or contradiction. No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable conclusion against him in the absence of explanation or contradiction ; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, human reason cannot do otherwise than adopt the conclusion to which the proof tends, if no explanation or contradiction is offered. (2)

Means of explanation.

• Lord Stowell observes, that when a criminal fact is ascertained, presumptive proof may be taken to shew who did it, in order to fix the criminal, having then an actual *corpus delicti* ; but to take presumptions, in order to swell an equivocal and ambiguous fact into a criminal fact, is an entire misapplication of the doctrine of presumptions. (3) However, on proper occasions, the same learned Judge was accustomed to resort to presumptive

*Corpus delicti.*

(1) In *Rex v. Burdett*, 4 B. & A. 161.

(2) Per Lord Tenterden, in *Rex v. Burdett*, 4 B. & A. 162.

(3) *Evans v. Evans*, 1 Hagg. Con.

Rep. 105. And see the observations of Lord Tenterden, in *Rex v. Burdett*, 4 B. & A. 162, as to the proof of the *corpus delicti*.

*Evidentia rei.*

evidence for the purpose of testing the truth of positive testimony, especially that presumption which arises from the conduct of the parties at the time of a transaction, the *evidentia rei* as he was used to call it, and which will generally be found to lead to a conclusion incompatible with direct testimony, where such testimony is invented or exaggerated. (1)

Fraud.

Where it appears that on one side there has been forgery or fraud in some material parts of the evidence, and they are discovered to be the contrivance of a party to the proceeding, it affords a presumption against the whole of the evidence on that side of the question, and has the effect of gaining a more ready admission to the evidence of the other party. (2)

Direct and circumstantial evidence.

With respect to the comparative weight due to direct and presumptive evidence, it has been said, that circumstances are in many cases of greater force and more to be depended on than the testimony of living witnesses: inasmuch as witnesses may either be mistaken themselves, or wickedly intend to deceive others, whereas circumstances and presumptions naturally and necessarily arising out of a given fact cannot lie. (3) It may be observed, that it is generally the property of circumstantial evidence to bring a more extensive assemblage of facts under the cognizance of a jury, and to require a greater number of witnesses than where the evidence is direct, whereby such circumstantial evidence is more capable of being disproved if untrue. (4)

On the other hand, it may be observed, that circumstantial

(1) *Evans v. Evans*, 1 Hagg. Con. Rep. 105, 112. See Lord Stowell's observations on the circumstantial evidence leading to the presumption of the fact of adultery, which, he observes, is rarely proved by direct testimony, *Loveden v. Loveden*, Hagg. Con. Rep. vol. ii. page 2. *Cadogan v. Cadogan*, 2 Hagg. 4, n. *Chambers v. Chambers*, 1 Hagg. 444. *Williams v. Williams*, *ib.* 294. *Elwes v. Elwes*, *ib.* 277. *Hammerton v. Hammerton*, 2 Hagg. 2 Ser. 14.

(2) See Mr. A. Stuart's Letters to Lord Mansfield, upon the Doug-

las case.

(3) Charge of Mountenoy, B., in the great cause of *Annesley v. Lord Anglesea*, and the opinion quoted by him, *ib.* 9 St. Tr. 426, 17 Howell, 1430. It was said, the presumptions in that case, arising from kidnapping, and the prosecution for murder, were stronger than the evidence of a thousand witnesses.

(4) See the observations of Mr. Bentham, on the probative force of circumstantial evidence, *Rationale of Judicial Evidence*, vol. iii. p. 251.

evidence ought to be acted on with great caution, especially where an anxiety is naturally felt for the detection of great crimes. This anxiety often leads witnesses to mistake or exaggerate facts, and juries to draw rash inferences; there is also a kind of pride or vanity felt in drawing conclusions from a number of isolated facts, which is apt to deceive the judgment. Not unfrequently a presumption is formed from circumstances which would not have existed as a ground of crimination, but for the accusation itself; such are the conduct, demeanor, and expressions of a suspected person, when scrutinized by those who suspect him. (1) And it may be observed that circumstantial evidence, which must in general be submitted to a Court of Justice through the means of witnesses, is capable of being perverted in like manner as direct evidence; and that, moreover, it is subjected to this additional infirmity, that it is composed of inferences each of which may be fallacious.

The principal authorities concerning presumptive evidence relate to particular presumptions of law. These are of two descriptions; First, where the presumption is conclusive in its nature, being in fact a rule of law, which is capable of being withdrawn altogether from the consideration of a jury, and which, if successive juries were to disregard it, would be enforced by granting as many new trials, the presumption (though usually a part of the common law) being as obligatory upon juries as any part of the statute law: (2) Secondly, when the presumption is authorized by having received greater or less judicial sanction, and by Judges being in the habit of recommending its adoption in terms more or less strong, but where it cannot be wholly withdrawn from the consideration of a jury, and when, though juries were to repudiate it, a new trial would

Presumptions  
of law.

Conclusive  
presumptions.

Authorized  
presumptions.

(1) Of the suspicious conduct sometimes exhibited by innocent persons under accusation of crimes, a remarkable instance is mentioned by Lord Hale in his Pleas of the Crown. On the dangers of circumstantial proof, see Defence of Donellan, published by his solicitors, A. D. 1781. On the general subject of *Presumptive Evidence*, see 7 Howell's St. Tr. 1529, n. 14 vol. 1230, 1229, 1246; 17 vol. 1430, 1341; 33 vol.

506. Burnet's Criminal Law of Scotland; Harris's Criminal Law of Scotland; Paley's Moral Philosophy; Evans's Appendix to Pothier, 339; Bentham's Rationale of Judicial Evidence, vol. v., which contains many valuable suggestions on this subject.

(2) Presumptions of this kind were distinguished in the civil law by the appellation, *Presumptio juris et de jure*.

not be granted as a matter of certainty, and probably not above one or two new trials would be granted in any case.

Conclusive  
presumptions,  
species of.

The first species of presumptions may be again divided into two kinds, first, when the presumption admits of no proof to the contrary, and secondly, where it only affords a *prima facie* inference, which is conclusive only in the absence of proof to the contrary.

Presumptions  
of law when  
established.

In the history of the law, several presumptions which were at one time deemed conclusive by the Courts, have, by the opinions of later Judges, acting upon more enlarged experience, become conclusive only in the absence of proof to the contrary, or have been treated as wholly within the discretion of juries. In modern times, many presumptions have been established, which convenience or general experience have dictated, and which are binding upon juries, until they are rebutted. Several presumptions of this nature have been created by the Courts; others have been made by act of parliament, and this principally in cases of revenue and penal statutes. (1)

Authorized  
presumptions,  
how sanc-  
tioned.

With respect to those presumptions of law, which are not considered imperative upon juries, the occasions, upon which Judges have afforded their sanction and authority to them, have been various. In some cases, it has been said, a jury ought to have drawn a particular inference which they have not drawn, and a new trial has consequently been granted. In others, the Court has observed, that a jury or inferior Court have not improperly acted upon a particular presumption, and that therefore the decision ought not to be interfered with. It has not unfrequently happened, that the same presumption has been spoken of by some Judges as a rule of

(1) A remarkable example of a statutory presumption, was that which was founded on a concealment of birth, by the repealed statute of 21 Jac. 1, c. 27. See *Ashford v. Thornton*, 1 B. & A. 405, where the nature of those presumptions is considered which were deemed

sufficient to support a counter plea to the wager of battle. It was observed by Abbot, J., that the instances put by Bracton, were, in his opinion, not sufficient, though at the time Bracton wrote, they were considered as conclusive presumptions.



law; whilst by others, it has been treated merely as fit to be recommended to a jury, or as one which a jury might properly make. Though the presumptions under consideration are strictly within the province of a jury, the language of Courts expressed in regard to particular presumptions may, in general, be expected to have considerable influence in the determination of future cases, whether by a Court or a jury, in which the like presumption may arise.

The presumption of prescriptive rights or of obligations from modern user, is seldom warranted in point of fact, or really entertained by juries. It seems, however, improper for a Judge to leave the presumption to a jury, where modern user is uncontradicted, as one which it was *competent* for them to make; they should rather be instructed, that they *ought* to make the presumption. (1)

In a recent case, the Court of Common Pleas were equally divided upon the question, whether a second new trial should be granted in a case where the Court appeared satisfied that the jury had acted in direct opposition to the presumption of unseaworthiness, arising from a ship recently after sailing becoming distressed without any adequate cause; which presumption has been sanctioned by great legal authorities, and has by some eminent Judges been expressly called a rule of law. (2)

It seems to be a presumption not admitting of proof to the contrary, that a person under the age of fourteen is unable to commit the crime of rape, (3) and also, that an infant under

Particular  
presumptions.  
Age.

(1) See per Parke, B., and Alderson, B., in *Jenkins v. Harvey*, 1 Cr. M. & R. 894. The usage had existed for more than seventy years. It was asked by the Court, that if juries were at liberty to make the presumption or not, at their discretion, what would become of moduses? In *Rex v. Joliffe*, 2 B. & C. 54, Lord Tenterden, Ch. J., speaks of modern user as affording cogent evidence of prescription; and, he observes, that it is fit to *recommend* a jury to make the presumption. In that case the

usage had existed only for twenty years.

(2) *Foster v. Steele*, C. B. Trin. T. A. D. 1837. *Douglas v. Scougal*, 4 Dow. 269. *Parker v. Potts*, 3 Dow. 23. *Watson v. Clark*, 1 Dow. 32.

(3) 1 Hale's P. C. 630. *Rex v. Groombridge*, 7 C. & P. 582, where it was held that the presumption was not affected by the statute 9 Geo. 4, c. 31. *Rex v. Eldershaw*, 3 C. & P. 396, unless as a principal in the second degree. The rule seems to be laid down, as if

the age of seven cannot be guilty of felony, (1) and it is a *prima facie* presumption of law, that a person under the age of fourteen is not guilty of a felonious intention, until evidence is produced to shew that he is *doli capax*; for then, it is said, *malitia supplet aetatem*. (2)

#### Legitimacy.

If a child be born after the marriage of the mother, and during the husband's life, it is presumed to be legitimate. It was formerly an established doctrine of the Courts, that this presumption in favor of legitimacy could not be rebutted, unless the husband was incapable of procreation, as from impotency or old age, or was absent beyond the four seas during the whole period of the wife's pregnancy. (3) This doctrine was not, however, conformable to earlier legal authorities. (4) In later times it came to be established, that the presumption, in favor of the legitimacy of the child of a married woman, might be rebutted, if it were shewn that the husband had not opportunity for sexual intercourse within such a period of time before the birth of the child, as admits of his having been the father. And, in the present day, even, where a husband and wife have had opportunities for sexual intercourse, at a time when the husband might have become the father of the child, a court or jury are at liberty to infer, from the circumstances of the case, that no sexual intercourse took place. (5) But where a

no proof could be admitted to the contrary of the presumption. It does not appear, whether in any case such proof has been tendered. Medical experience shews, that the presumption is not always according to fact and truth.

(1) 1 Hale, P. C. ch. 3; 1 Russell on Crimes, ch. 1.

(2) *Rex v. Owen*, 4 C. & P. 236. A boy between eight and nine has been executed for arson, and a boy of the age of ten for murder. The age of witnesses was formerly regulated by the practice of the Courts. In the Banbury Peerage case, Sir S. Romilly argues, that it is a presumption of English law that parties are never too old to beget children; but it would seem that this doctrine, as far as it is a

positive rule of law, only applies to estates tail. As to the presumption of the illegitimacy of children, on account of the tender years of the father, Rolles' Abr. tit. Bastardy, 359.

(3) Co. Litt. 244, a. *Rex v. Alberton*, 1 Lord Ray. 395. *Regina v. Murray*, 1 Salk. 121.

(4) See the ancient authorities collected in *Le Merchants' Preface* to the Gardiner's Peerage case.

(5) *Pendrell v. Pendrell*, 2 Str. 925. *Rex v. Reading*, Rep. temp. Hard. 82. *Rex v. Luffe*, 8 East, 193. Banbury & Gardiner Peerage cases, *Le Merchant's Ed.* See the *Ed. Rev. March*, 1829, where it is contended, that the want of recognition on the part of the husband is essential to the proof of

jury believe that sexual intercourse took place between husband and wife, at a time when it might have led to the conception of the child whose legitimacy is disputed, it would seem that they ought not to find the child a bastard. (1) Children, born during a divorce *a mensâ et thoro*, are presumed to be illegitimate. (2)

The fact of marriage is generally considered as sufficiently proved by presumptive evidence of cohabitation, or even by general reputation, (3) but in actions for adultery and on indictments for bigamy an actual marriage must be proved. (4) Even where a marriage between parties is proved to have been illegal, it may be competent for a jury to presume, from the circumstances of the case, where the parties have cohabited as man and wife, that a subsequent valid marriage has taken place. (5)

There is a general presumption in criminal matters, that a person intends whatever is the natural and probable consequence of his own actions. Where a prosecutor, on an indictment for forging a receipt with intent to defraud him, swore

illegitimacy, *Cope v. Cope*, 1 M. & Ro. 275. *Morris v. Davies*, 3 C. & P. 215. *Rex v. Luffe*, 8 East, 206. *Goodright v. Saul*, 4 T. R. 356.

(1) *Cope v. Cope*, 1 M. & Ro. 275, where it is said by Alderson, B., that where a jury believes that a husband and wife have actually had sexual intercourse within the requisite limits of time, the law will not allow a balance of the evidence as to who is most likely to have been the father. See *Head v. Head*, 1 Sim. & Stu. 152. 1 Turn. 139. It may, perhaps, be thought that even this point will ultimately be reduced within the province of a jury. It has been said, that if a man marries a woman visibly pregnant, it is a conclusive inference of law, that the child is legitimate. As to the existence of any presumption respecting the length of the period of gestation, see the evidence in the *Gardiner's Peerage* case, *Hargr. Co. Litt.* 123, b. n.

1 & 2. *Alsop v. Bowtrell*, Cro. Jac. 541. As to the presumption when a widow marries again, and has a child within nine months, *Harg. Co. Litt.* 8 a. n. 7.

(2) *Parish of St. George v. St. Margaret*, 1 Salk. 123.

(3) *Doe v. Fleming*, 4 Bing. 266, though the parties whose marriage was disputed might have been called as witnesses in an ejectment brought by their heir, *Reed v. Prosser*, Peake, 233.

(4) *Morris v. Miller*, 4 Burr. 2057. *Birt v. Barlow*, 1 Doug. 170. It was said by Lord Mansfield, that the action might be turned to bad purposes, if persons could give the name of a wife to women to whom they were not married, 1 Russell on Crimes, 206, 207. It is not necessary to prove registration, licence, or banns. *Rex v. Alison*, R. & R. 109.

(5) *Wilkinson v. Payne*, 4 T. R. 468.

that he believed the prisoner had no such intent, the Judge directed the jury, that the defrauding, being the necessary effect and consequence of the forgery, was sufficient evidence of the intent of the prisoner to warrant them in convicting. (1)

## Malice.

It seems to be clearly a presumption of law, which ought not to be left to the discretion of the jury, that where an act is done injurious to an individual, malice is *prima facie*, to be presumed in the person doing that act. Thus a new trial has been granted, because a Judge left it to the jury to say, whether a defendant intended to injure the plaintiff by the publication of a libel, the Court determining that the law would presume the intention. (2) Sir M. Forster observes, that, in every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity or infirmity are to be satisfactorily established by the prisoner, unless they arise out of the evidence produced against him; for the law presumes the fact to be founded in malice, unless the contrary appears. (3)

## Innocence.

A presumption exists against criminality and the commission of fraud. (4) Thus, where a plaintiff complained that a defendant had put on board of a vessel combustibles which occasioned the loss of the vessel, the Court held it to be incumbent on the plaintiff to prove the negative, that no proper notice

(1) The Judges held the conviction to be right, *Shepherd's case*, R. & R. 169. See *Phelps's case*, 1 Mo. Cr. Ca. 263; *Maragora's case*, R. & R. 291; *Farrington's case*, R. & R. 207, where intention to injure the owner of a mill set on fire was presumed. *Dixon's case*, 3 M. & S. 15.

(2) *Haire v. Wilson*, 9 B. & C. 643. The distinction between malice in fact and in law, is explained by Bayley, J., in *Bromage v. Prosser*, 4 B. & C. 253. In actions for malicious prosecution, malice may be presumed from want of probable cause, *Burley v. Bethune*, 5 Taunt. 583. See *Turner v. Turner*, Gow, 20. *Brooks v. Warwick*, 2 St.

389. *Cozer v. Pilling*, 4 B. & C. 26. But the want of probable cause is only presumptive evidence of malice, and ought not to be left to the jury as conclusive, *Mitchell v. Jenkins*, 5 B. & Ad. 588. On the inference of malice in criminal cases, *Foster's Disc.* 256, 257, 3 M. & S. 15. R. & R. 169, 207, 191.

(3) Sir M. Foster's Discourses, 256, 257. 1 Hale's P. C. 465. 1 East's P. C. 340, 3 M. & S. 15. R. & R. Cr. Ca. 169, 207, 291.

(4) 10 Coke, 56, the case of the Chancellor v. the University of Oxford, where see the various Latin maxims by which this presumption has been expressed.

had been given, and they confirmed a nonsuit upon this ground. (1) The force of this presumption has been considered, in a late case, not so great as to preclude a jury, or a Court of Quarter Sessions from presuming the continuance of human life, although such presumption necessarily led to a conclusion that a party had been guilty of bigamy. (2) But on the other hand, the presumption, that a party has not been guilty of bigamy, may, it has been held, warrant a jury or Court of Quarter Sessions in concluding that a person was dead, who had been proved to have been alive within seven years. (3)

It appears from the case of *Williams v. East India Company*, that the presumption under consideration may have the effect of shifting the *onus probandi* from the person who has to prove the affirmative to him who relies on the negative; (4) but it is conceived that it will not have this effect, where the affirmative lies peculiarly within the knowledge of the party supposed to be criminal. Thus, in an action for practising as an apothecary without having obtained a certificate, the proof of the certificate lies on the defendant. (5) The like rule obtains in convictions against persons for trading as hawkers, or selling without license. (6)

(1) *Williams v. E. I. Co.* 3 East, 192. For other examples, see *Rex v. Hawkins*, 10 East, 211, presumption of taking the sacrament. *Powell v. Milbank*, 3 Wils. 355; 2 Bl. 851. *Monke v. Butler*, 1 Roll. R. 83. *Clayton's R.* fol. 48, Dr. Hasler's case, Comb. 202. *Rex v. Coombs*, Comb. 57. B. N. P. 298. *Rex v. Rogers*, 2 Camp. 654. *Bennet v. Clough*, 1 B. & A. 461. *Sissons v. Dixon*, 5 B. & C. 758. *Rodwell v. Redge*, 1 C. & P. 220, license of a theatre presumed. 3 Ch. Ca. 114; Cro. Car. 550; Latch. 68; and see the cases, where a person acting in a public capacity is presumed to have been duly appointed.

(2) *Rex v. Harbonne*, 2 A. & E. 545.

(3) *Rex v. Twynning*, 2 B. & A. 388. The general observations of

the Court as to the force of the presumption of innocence in this case, are impugned by the observations of the Court, in *Rex v. Harbonne*, 2 A. & E. 545.

(4) 3 East, 192, and see B. N. P. 298. *Monke v. Butler*, 1 Roll. Rep. 83, cited by Lord Ellenborough, 3 East, 199. *Powell v. Milbank*, 2 Bl. Rep. 851. *Rex v. Coombs*, Comb. 57. Gilb. Ev. 132.

(5) *Apothecaries' Co. v. Bentley*, R. & M. 159. See 4 B. & A. 140; 9 Price, 257; 5 M. & S. 211; 1 B. & C. 150; 3 B. & C. 242; 2 East's P. C. 782; *Dickson v. Evans*, 6 T. R. 57.

(6) *Rex v. Hanson*; Paley on Convictions, by Dowling, 45; and the cases of qualifications under the repealed Game Laws, 1 T. R. 144; 1 East, 650; 2 Russ. on

Publication  
of libels.

But where a libel is sold at a bookseller's shop by his servant, it is, at least, presumptive evidence of a publication by the master; though, in general, an authority to commit a breach of the law is not to be presumed. This is stated to be upon a ground of policy, lest irresponsible persons should be put forward, and the person who really produces the publication, and without whom it could not be published, should escape. (1)

Presumption of  
theft from  
possession.

The most common case of presumptive evidence in criminal proceedings is the presumption arising from the possession of stolen property. Juries are frequently warranted, by the sanction if not by the recommendation of Judges, to presume that a person, who is found in possession of stolen property recently after it has been missed, has been guilty of stealing it. Sometimes this presumption has been spoken of as made by the law; but it seems to be a presumption purely of fact. It depends upon various circumstances, especially on the interval of time which has elapsed since the loss of the property, and the probability of the prisoner having had access to it. (2)

*Contra spolia-*  
*tozem.*

Where a person is proved to have suppressed any species of evidence, or to have defaced or destroyed any written instrument, a presumption will arise, that if the truth had appeared,

Crimes, 692. *Rex v. Turner*, 5 M. & S. 206. *Rex v. Smith*, 3 Burr. 1475. 1 B. & P. 468; 2 B. & P. 307.

(1) *Gutch's case*, M. & M. 433. *Almon's case*, 5 Burr. 2698. *Walter's case*, 3 Esp. 21. *Cuthel's case*, Holt on Libel, 287; 2 Starkie on Slander, 33; *Dodd's case*, 2 Sess. Ca. 33; 1 Russ. on Crimes, 236. See *Harding v. Greening*, 8 Taunt. 42. Several authorities appear to decide, that the master is responsible for the publication by his shopman, in the ordinary course of his business, notwithstanding he is able to negative all knowledge of the particular libel, by shewing that he has been kept away from the premises for a long time by illness.

(2) See the observations on this presumption, 2 East's P. C. 656,

665; 2 Hale's P. C. 289. As to the interval elapsing between the loss and discovery of the property, see *Anon.* 2 C. & P. 459. *Roeccoe*, on Cr. Evidence, 17. It may be observed, that this presumption is frequently as strong in favor of receiving stolen property, as of stealing it. As to the possession of stolen property being evidence of another felony, *e. g.* *Arson*, *Rickman's case*, 2 East's P. C. 1035. That it is not necessary that the stolen property should be discovered before the prisoner's apprehension, see per Lord Ellenborough and Lord Tenterden, in *Watson's case*, 2 St. 139. Cases of difficulty in practice frequently occur, where stolen property is found in the house of a prisoner, but there are other inmates capable of stealing it.

it would have been against his interest, and that his conduct is attributable to his knowledge of this circumstance. In a case where the finder of a jewel would not produce it, upon an action of trover being brought against him to recover it, Chief Justice Pratt directed the jury, that they ought to presume the strongest against him, and to make the value of the jewel of the finest water that would fit the socket of the one which had been withheld, the measure of their damages. (1) In *Harwood v. Goodright*, (2) a testator made a will, and devised premises to A.; afterwards he made another will, which was lost, and which the jury found, by a special verdict, to be different from the former will, but they did not find in what particular the difference consisted: the Court decided, that the devisee under the first will was entitled to the estate; but Lord Mansfield said, that in case the devisee under the first will had destroyed the second, it would have been a good ground for a jury to find a revocation.

The fabrication of evidence is calculated to raise a presumption against the party who has recourse to such a practice, not less than when evidence has been suppressed or withheld. Legal experience however, has shewn that false evidence has sometimes been resorted to, for proving facts which are true. (3) In the *Douglas Peerage case*, the successful party had to contend with a presumption against him arising from the fabrication of several letters. (4)

Fabrication of evidence.

It has been considered, that upon a charge of robbery it is

(1) *Armory v. Delamire*, 1 Str. 505.

(2) Cowp. 86. For other examples of this presumption, see the case of *Annealey v. Anglesea*, 17 Howell, 1430, where the presumption arose from the plaintiff being kidnapped and sold for a slave. Sir S. Romilly's speech on Lord Melville's trial, where most of the cases are collected. *Cowper v. Cowper*, 2 P. Wms. 720, 748, 752. 8 Ves. 363. *Gartside v. Ratcliffe*, 1 Ch. Ca. 292. *Delany v. Tension*, 3 Br. P. C. 659. *Dalston v. Coulsworth*, 1 P. Wms. 731. *Anon.*

1 Lord Raym. 731. *Barker v. Ray*, 2 Russ. 73. *Evans's Pothier*, vol. 2, p. 336. *Crisp v. Anderson*, 1 St. 35. *Clunnes v. Pezzy*, 1 Camp. 8 n. *Braithwaite v. Coleman*, 1 Harr. 22; Burr. 2484. As to the inferences to be drawn from withholding books, after notice to produce, *Cooper v. Gibbons*, 3 Camp. 363. *Lawson v. Sherwood*, 1 St. 314.

(3) See a remarkable instance, 4 Institute, 232.

(4) See Appendix to *Evans's Pothier*, respecting the four letters of Lamarre, the Surgeon, fabricated by Sir J. Stewart.

not necessary that actual fear should be strictly proved, because, as it is said, the law, *in odium spoliatoris*, will presume fear, where there appears to have been a just ground for it. Accordingly an indictment for robbery has been sustained, where the party robbed sought out the robber and submitted to be robbed by him, purposely with the view of bringing him to justice. (1)

**Continuance.** In general, there is a presumption in favor of the continuance of what is once proved to have existed. (2) But in questions concerning the duration of human life, there is a presumption which has been much sanctioned and acted upon (if it be not obligatory upon juries), that where a person has been absent abroad for seven years, he is to be presumed to be dead. This period has been adopted as the ground of such presumption, from analogy to the statute 1 Jac. 1, c. 11, relating to bigamy, and to the statute 19 Car. 2, c. 6, relating to the continuance of lives on which leases are held. (3) But the fact of absence for seven years raises no inference as to the exact time of the death, or that the death took place at the end of seven years. (4)

(1) Fost. 128, 2 East's P. C. c. 16, s. 128. 1 Russ. on Crimes, 72.

(2) *Wilson v. Hodges*, 2 East, 312. *Throgmorton v. Walton*, 2 Roll. R. 461, where insanity is once established, it is presumed to continue till a lucid interval is proved. *Atty. Gen. v. Parnter*, 3 Br. Ch. Ca. 25. *Ex parte, Holyland*, 11 Ves. 10. *White v. Wilson*, 13 Ves. 88. *Swinb.* 72, 78. *Hargr. Co. Litt.* n. 185. *White v. Driver*, 1 Phillim. 100. *Groom v. Thomas*, 2 Hagg. 2 Ser. 434, presumption of continuance of public appointment. *Rex v. Budd*, 5 Esp. 230.

(3) In *Doe d. George v. Jesson*, 6 East, 85, the presumption is spoken of as a rule of law. *Doe d. Lloyd v. Deakin*, 4 B. & A. 433. *Rowe v. Hasland*, 1 W. Bl. 408, at the period of which decision the presumption does not appear to have been so definite as to time. *Hopewell v. De Penna*, 2 Camp. 113, where, in a plea of coverture, the defendant was held to be bound to prove her husband alive within seven years. In *Rex v. Harbonne*, 2 A. & E. 544, Lord Denman, Ch. J., said, that there

was no rigid rule of presumption upon such questions of fact, without reference to accompanying circumstances, as, for instance, the age or health of the party. Death, without issue, may be presumed, where marriage and issue are two affirmative facts to be proved. *Doe d. Oldham v. Wolley*, 8 B. & C. 22. See *Doe v. Griffin*, 15 East, 293. *Rowe v. Hasland*, 1 W. Bl. 404. The presumption of death, from absence of seven years, was formed previous to the statute of bigamy, in *Thorne v. Rolffe*, *Dyer*, 185. *Bendl.* 86.

(4) *Doe d. Knight v. Nepean*, 2 A. & E. 95, where the lessor of the plaintiff sought to place the period of death at the end of seven years, in order to avoid an adverse possession. *Watson v. King*, 1 St. 121, where it was held, that the time of death of a person, sailing on board a missing ship, was to be judged of according to the special circumstances. *Norris v. Norris*, Rep. tem. Finch, 419. *Dixon v. Dixon*, 3 Br. Ch. Ca. 510; and Mr. Belts' notes.



By the civil law and in foreign codes several rules are laid down for the direction of Courts, in ascertaining the fact of survivorship, where several persons have perished by the same calamity. No very definite rule has been adopted in this country upon the subject; but there appears to have been a leaning to consider the person possessed of the property in dispute to have survived, and some regard appears to have been paid to the probability of the survival of the stronger party. (1)

**Of survivorship.**

With respect to the presumption of the loss of missing ships, a practice is said to prevail among underwriters, that a ship shall be deemed lost, if not heard of for six months after her departure for any part of Europe, or in twelve months after departure for any greater distance. (2)

### Missing ships.

It has been seen, that it is a rule that all public officers, who are proved to have acted as such, are presumed to have been duly appointed to the office, until the contrary is shewn, and that the force of this presumption is so strong as to supersede the rule which excludes secondary evidence. (3)

**Public ap-  
pointment.**

**Where acts are of an official nature, or require the concur-**

**Presumption  
omnia rite  
acta.**

(1) *Taylor v. Duplock*, 2 Phillimore, 263. *Colven v. H. M. Procurator Gen.* 2 Ser. Hagg. vol. 1. p. 92. *Rex v. Dr. Hay*, 1 W. Bl. 640. *Case of General Stanwix*, *Fearn's* posthumous works. In the goods of *Selwyn*, 3 Hagg. Ecc. R. 748. *Mason v. Mason*, 1 Mer. 308, n. *Broughton v. Randall*, Cro. Eliz. 503. *Case of Father and Son*, joint-tenants, hanged in the same cart, the wife of the son claiming dower. *Wright v. Netherwood*, 2 Salk. 593, n., question of revocation of a Will, a father, wife, and child dying by shipwreck. The French Code, Liv. 3, tit. 1, ch. 1.

(2) Park on Ins. 106, 107, 2 Str. 1199. Patterson v. Black, Park on Ins. 433. Newly v. Reed, Park, 63. Green v. Brown, 2 Str. 1199. Cohen v. Hinkley, 2 Camp. 51. Kostu v. Innes. R. & M. 333.

Twemlow v. Oswin, 2 Camp. 85.  
Houstman v. Thornton, Holt, 242.  
Kostu v. Reed, 6 B. & C. 19. Wat-  
son v. King, 1 St. 121.

(3) *Vide supra*, *Secondary Evidence*. *M'Gahey v. Alston*, 2 M. & Wel. 211. The action was brought in the name of the public officer, but he was only a nominal party. It was said, generally, that it was quite immaterial that the action was brought in the name of the officer; but the reason assigned, that such proof was allowed in actions against justices and constables, is not a good one, because there the doctrine of admissions applies. Doubts have been entertained, whether the rule prevails, where an ejectionment is brought in the name of the parish officers. Cases of this description rest in some measure upon the presumption, that a party had not committed an unlawful act.

rence of official persons, a presumption arises in favor of their due execution; it has been said on such occasions, "*Omnia præsumuntur rite acta.*" Thus, in order to support a parish certificate, a custom was presumed contrary to the common law, of the parish having only one churchwarden, and it was also presumed that a party to the instrument had died within a very short period, on the ground that the certificate had been sanctioned by justices. (1)

This presumption has been extended to the acts of private individuals, especially when they are of a formal character, as writings under seal. Thus, in *Doe d. Griffin v. Mason*, (2) in an action in which the plaintiff's title was founded on the assignment of a term to secure an annuity, it was objected that there was no proof of the annuity being enrolled; but Lord Ellenborough held, that proof of the want of enrolment should come from the other side, and that he would presume the security to be valid, till the contrary was shewn. Where there was proof that a party had signed a deed which purported to have been sealed and delivered, it was held, that the Judge at *Nisi Prius* had not done wrong in leaving it to the jury to infer, that the deed had been sealed and delivered. (3)

(1) *Rex v. Catesby*, 2 B. & C. 820; and see *Rex v. Morris*, 4 T. R. 550. *Rex v. Hinckley*, 12 East, 361. *Rex v. Bestland*, 1 Wils. 128. *Rex v. Long Buckby*, 7 East, 45, where an indenture executed thirty years before, was presumed to be stamped against strong negative evidence.

(2) 3 Camp. 7.

(3) *Talbot v. Hodson*, 7 Taunt. 251. The illustrations of this presumption are very numerous. For example, *M'Queen v. Farquhar*, 11 Ves. 467. Necessary priority of conveyances of the same date, *Barker v. Keate*, 1 Freem. 251; 1 Burr. 106; 2 Co. 75, a. *Sheets of a Will present in a room*, *Bond v. Seawell*, 3 Burr. 1773; 1 Bl. 407. Subscription in testator's presence, *Hands v. James*, Com. 531. *Brice v. Smith*, Willes, 1. *Croft v. Pawlet*, 2 Str. 1109, Cro. Eliz. 401. *Bac. Ab. Ev. 2 Saund. 42. Ancient*

*certificates*, *Rex v. Upton Gray*, 10 B. & C. 807. *Rest v. Hobson*, 1 Sim. & Stu. 543. Interlineations before sealing, *Trowell v. Castle*, 1 Keb. 22. *Hargr. Co. Litt. 225, b. n. 1. Glanville v. Paine*, Barn. 19. *Fitzgerald v. Fauconberg*, Fitzg. 204. Consecration of chapel, 2 Hagg. 2 Ser. 50. As to this presumption, in cases of judgment by default, *Doe v. Lewis*, 1 Burr. 614. Confirmation of conveyance of glebe, Cro. Jac. 456. Sanction of right of presentation to a chapel of ease, 2 Eden, 360; Ambl. 528, 4 B. & C. 455. Confirmation of modulus, 2 P. Wms. 573. Composition real, 2 Anstr. 372. Consent to inclosure, 1 Vern. 32; 5 Vin. Ab. 8, pl. 32. Performance of condition, *Grimes v. Smith*, 12 Co. 4. Republication of Will, 8 Ves. 129. Induction, *Chapman v. Beard*, 3 Anstr. 342. Enrollment of charitable use, 3 B. & A. 152. Surren-

But it is a rule, that in inferior Courts and judicial proceedings by magistrates, the maxim "*Omnia præsumuntur rite esse acta*," does not apply so as to give jurisdiction; (1) therefore, where an examination of a soldier, taken before two magistrates, was tendered to prove his settlement, but it did not appear by the examination itself, or by other proof, that the soldier, at the time he was examined, was quartered in the place where the justices had jurisdiction, it was held that such an examination was not receivable in evidence. (2)

Presumptions are frequently made from the regular course of a public office. Thus, where it was proved that the custom-house would not permit an entry to be made, unless there had been an indorsement made upon a licence, it was held, after proof that the licence had been lost, that the indorsement might be presumed from the entry. (3) If a letter is sent by the post, there is a *prima facie* presumption, from the usual course of a department of the public service, that it reached its destination, till the contrary is proved. (4) And presumptions are frequently drawn from the usual course of private offices, that letters have been sent by the post, or notices delivered, where the persons are dead, who alone could give direct evidence of the fact. (5)

Course of public office.

Private office.

der of copyhold, 1 J. & W. 620. 10 East, 409. Copyhold admittance, *Blunt v. Clarke*, 2 Sid. 61. *Froswell v. Welsh*, Roll. Ab. 505; 3 Bulstr. 214, 217, 239; *Godb. 269*; *Cro. Jac. 403*. *Watkins on Copyholds*, 269, n. 7 *East*, 21; *Dyer*, 292, a. from the Lords' acceptance; *Cookes v. Hellier*, 1 Ves. 234, from the Lords' enfranchisement.

(1) *Per Holroyd, J.*, 7 B. & C. 790. *Rex v. Helling*, 1 Str. 7, overruling *Regina v. Gouche*, 2 Salk. 441. *Rex v. Hulcot*, 6 T. R. 583.

(2) *Rex v. All Saints, Southampton*, 7 B. & C. 789.

(3) *Butler v. Alnutt*, 1 St. 222.

(4) *Per Parke, B.*, in *Warren v. Warren*, 1 Cr. M. & R. 252. Proof

of notice of dishonor, by putting letter into the post, *R. & M.* 149; 2 Campb. 633; 9 East, 347. Post marks are evidence that the letters were in the office at the times which the dates specify, *R. & R.* 264; 3 St. 64; 2 Camp. 23; 1 M. & M. 276. *Vide infra*, part 2.

(5) *Doe d. Pattershall v. Turford*, 3 B. & Ad. 895, service of a notice to quit. The deceased person had made a memorandum of the service, which was admissible, according to a recognised exception to the rule which excludes hearsay evidence. As to the effect of the course of business in proving that letters have been sent by the post, where the clerks of an office are dead, *Pritt v. Fairclough*, 3 Camp. 305. *Hagedorn v. Reid*, 3

## Possession.

Several presumptions are made in favor of a person who is in possession of property. A person in possession of land, is *prima facie* presumed to be seised in fee. (1) This presumption, however, may be rebutted by a stronger presumption arising from circumstances, as from subsequent possession; it is not conclusive evidence of a seisin requiring to be divested by deeds. (2) Possession of personal property affords a *prima facie* presumption of ownership. Thus, although a documentary title is essential to the ownership of ships, it is sufficient, in an action upon a policy, for the plaintiff to rest upon the mere fact of possession, unless further proof be rendered necessary by contrary evidence being adduced. (3)

## Boundaries.

There are certain *prima facie* presumptions in respect of the ownership of property, which seem to have the force of rules of law, though a jury must draw the conclusion which is derived from them. Thus, the ownership of a road, *ad medium filum viæ*, presumptively belongs to the owner of the adjacent land; (4) and there is the like presumption in respect of the property in rivers. (5) It is a presumption, that strips of waste land, which adjoin a road, belong to the owner of the adjoining inclosed land, whether he be a freeholder or copyholder, and not to the Lord of the

Camp. 377. *Toosey v. Williams*, M. & M. 129. As to the effect of the like course of business, where the clerks are living, *Hetherington v. Kemp*, 4 Camp. 193. *Hawkes v. Salter*, 4 Bing. 715.

(1) *Vide* the cases, *supra*, of declarations against interest by persons in possession of property, which depend on this presumption.

(2) *Jayne v. Price*, 5 Taunt. 326, as to presumptive right to minerals. *Rowe v. Grenfel*, R. & M. 396; *Rowe v. Brenton*, 8 B. & C. 737, of quit rent. *Doe v. Johnson*, Gow, 173, of property in mines. B. N. P. 33; as to rebutting the presumption arising from possession, by shewing that an ancestor has not conveyed by true recovery, *Doe v. Pike*, 3 B. & Ad. 738.

(3) *Robertson v. French*, 4 East,

130. See also *Trotter v. Harris*, 2 Y. & J. 285, possession of the franchise of a ferry. *Doe v. Dye-ball*, M. & M. 346. *Doe v. Clarke*, 7 Bing. 346, possession of title in ejectment against a wrong doer. Further on, presumptions from possession, *Sutton v. Buck*, 2 Taunt. 302. *Thomas v. Foyle*, 5 Esp. 88. *Catteris v. Cowper*, 4 Taunt. 547. *Graham v. Peat*, 1 East, 244. *Sheriff v. Cadell*, 2 Esp. 617. *Webb v. Fox*, 7 T. R. 397. 1 B. & P. 44; 1 St. 374, 454; 3 Esp. 140, 278; *Peake*, 148.

(4) *Berry & Goodman's case*, 2 Leon. 148. Per *Gibbs*, Ch. J., in *Grose v. West*, 7 Taunt. 40. See *Headlam v. Hedley*, Holt, N. P. 463.

(5) *Hale de Jure Maris*, part 1, ch. 1, *Callis on Sewers*.

Manor, unless the strips communicate with open commons, or larger portions of land. (1) In speaking of the latter presumption, Mr. Justice Bayley says, it is very desirable, that there should be one certain and definite rule applicable to all cases of this description; (2) and Mr. Justice Holroyd remarks, that it was of considerable importance, that the *prima facie* presumption should be constant and uniform. (3)

By the prescription act, 2 and 3 W. 4, c. 71, various presumptions, which juries had been ordinarily recommended, if not directed, to make from modern user, as to the existence of immemorial rights, or of modern rights founded on supposed non-existing grants, have been converted into positive rules of law. Previous to this act, a technical effect was given to the evidence of enjoyment of certain incorporeal rights for the period of twenty years, which, though, in theory, only presumptive evidence, was in practice and effect a bar. (4)

Incorporeal rights.

With respect to the presumed creation of rights of way, it is to be observed, that notwithstanding the statute, the dedication of public ways is still a matter to be presumed by juries; and in making a presumption in such cases, numerous circumstances require to be taken into consideration, the effect of

Public way.

(1) *Doe d. Pring v. Pearsay*, 7 B. & C. 304. *Steel v. Prickett*, 2 St. C. 463. *Grose v. West*, 7 Taunt. 40. *Cook v. Green*, 11 Pr. 736. The presumption has a reasonable foundation, since, if the road was out of repair, travellers might go upon the adjacent land, which would be a reason for the owner not inclosing up to the margin of the road. It appears not to exist where the road is defined for the first time under an inclosure act, *Rex v. Hatfield*, 4 A. & E. 165.

(2) In *Doe v. Pearsey*, 7 B. & C. 304.

(3) *Ibid.* Presumptive ownership of walls. *Duke of Newcastle v. Clark*, 8 Taunt. 613. *Wiltshire v. Sidford*, cited 8 B. & C. 259. *Matts v. Hawkins*, 5 Taunt. 20. *Callis on Sewers*, p. 74. Of trees, *Masters v. Pollie*, 2 Roll. R. 141.

*Holder v. Coates*, 1 M. & M. 112. *Waterman v. Soper*, 1 Lord Raym. 737. 2 Roll. R. 255; B. N. P. 85, of materials of public bridge. *Hamson v. Parker*, 6 East, 154, of soil in separate fishery. *Lloft*, 364, of ditches. *Vowles v. Miller*, 3 Taunt. 138. *Guy v. West*, 2 Selw. N. P. 1218; of balks between commons and private lands. *Bailiffs of Godmanchester v. Phillips*, 4 A. & E. 556.

(4) Per Parke, B., in *Bright v. Walker*, 1 Cr. M. & R. 217. The statute does not prevent a jury from presuming a grant from possession with other circumstances, if they believe one to have been actually made; but it precludes the presumption from possession alone for a less period of enjoyment than that prescribed. *Ibid.*

which has, in different instances, been more or less clearly defined by legal authorities. (1)

Faculties.

Fences.

Act of parliament.

With respect to the presumption of incorporeal rights from user not included within the statute, many presumptions may continue to be formed by juries, and will, it is conceived, be recommended to them in deference to legal authority, and in consonance with the justice of a case, though contrary to their opinion of the real facts; as, when faculties are presumed for regulating the right to pews or vaults. (2) The like may be said of copyhold customs, (3) and the liability to repair fences. (4) Various other instances might be added, resting as well upon modern as immemorial title. (5)

It has been said, that an act of parliament may be pre-

(1) The limit of time is not clearly defined, and the question is generally affected by other stronger circumstances, than mere lapse of time. See *Rex v. Lloyd*, 1 Camp. 262. *Trustees of British Museum v. Furnis*, 5 C. & P. 460. *Trustees of Rugby Charity v. Merriweather*, 11 East, 376, n. 2 M. & S. 262; 4 Camp. 189. As to the effect of a bar, *Roberts v. Karr*, 2 Camp. 262, n. *Lethbridge v. Winter*, 1 Camp. 263, n. 11 East, 376, n. As to limited dedications, *Marq. of Stafford v. Coyney*, 7 B. & C. 257. *Woodyer v. Haddon*, 5 Taunt. 125. As to the persons, whether tenants or trustees competent to dedicate, *Rex v. Leake*, 5 B. & Ad. 469. *Wood v. Veal*, 5 B. & Ad. 454. *Rex v. Barr*, 4 Camp. 16. *Harper v. Charlesworth*, 4 B. & C. 574. 2 B. & C. 686; 11 East, 372; 4 B. & A. 579.

(2) *Rogers v. Brooks*, cited 1 T. R. 431, n. *Pettman v. Bridger*, 1 Phillim. 323. *Fuller v. Lane*, 2 Adams, 425. *Walter v. Gunner*, 1 Hagg. 314. Com. Dig. *Eagles*. *Byerley v. Windus*, 5 B. & C. 1. *Mainwaring v. Giles*, 5 B. & A. 360. *Stock v. Booth*, 1 T. R. 430. *Griffith v. Matthews*, 5 T. R. 296. The presumption of the right of pew against a wrongdoer appears to be different from that which

would be made against churchwardens.

(3) A single entry upon the rolls may afford evidence from which a copyhold custom may be presumed, *Doe d. Mason v. Mason*, 3 Wils. 63.

(4) 6 B. & C. 337. *Chectham v. Hampson*, 4 T. R. 318; 2 Wms. Saund. 285, n. 4; 290, n. 7. *Booth v. Wilson*, 1 B. & A. 59. *Churchill v. Evans*, 1 T. R. 529. Vin. Ab. tit. Fences. Com. Dig., action on the case for negligence.

(5) See *Gray v. Bond*, 2 B. & R. 667, presumed grant of right of lending nets. As to the presumption of the endowment of vicarages, *Wooley v. Brownhill*, M'Clel. 331. *Inman v. Whormby*, 1 Y. & J. 545. *Wooley v. Birkenshaw*, 12 Price, 702. *Apperley v. Gill*, 1 C. & P. 316. The abandonment of the rights to ways, commons, and light may, it is conceived, notwithstanding the statute, sometimes give rise to questions of presumptive evidence. See 3 B. & C. 339, as to the waiver of an implied covenant in law within twenty years, in the case of lights. As to releases of incorporeal rights, see 12 Ves. 266; 2 B. & A. 791; 3 B. & C. 339; 15 East, 108; 1 St. 102; 1 Price, 251, 253; Vin. Ab. 16, pl. 3.

sumed. (1) Thus, where a road obstructing a navigable channel had existed for so long a time, that the state of the channel could not be proved, it was considered that an act of parliament, or a writ of *ad quod damnum*, might be presumed, which had extinguished the public right in the channel. (2)

Writ of *ad quod damnum*.

Grants from the Crown may be presumed; but where such a presumption has been made, it has been under particular circumstances, and, after a much longer period of time than has been deemed sufficient for raising the presumption of a grant from private individuals. (4)

Grants from the crown.

Conveyances between private individuals are often recommended to juries, in more or less forcible terms, as presumable in favor of a party who has proved a right to the beneficial ownership of property, and whose possession has been consistent with the existence of such a conveyance as is to be presumed, especially if the possession cannot be accounted for, and would have been unlawful, except on the supposition of a conveyance; such presumptions are made to prevent justice being defeated by a mere formal objection to the party's title in a Court of Law. (4) But where the original possession of pro-

Private conveyances.

(1) By Lord Mansfield, in *Eldridge v. Knott*, Cowp. 215, citing Lord Coke.

(2) *Rex v. Montagu*, 4 B. & C. 599. See Cowper, 215; 1 Eden, 296; 6 Ves. 215; 2 Ves. Jun. 583; 1 Jac. & W. 63; *Lopez v. Andrews*, Hayes' Conv. 11 n. That a private act of parliament may be presumed, Skinner, 78; 12 Ves. 265. That the relinquishment of public rights is not to be presumed in the same manner as that of private rights, *Vooght v. Winch*, 2 B. & A. 662. 4 Burr. 2613; 7 East, 199.

(3) *Roe v. Ireland*, 11 East, 161, enfranchisement of a copyhold by the Crown, presumed after an enjoyment of more than a hundred years. *Rex v. Brown*, cited by Lord Mansfield, Cowp. 110; 1 J. & W. 159. *Mayor of Kingston v. Horner*, Cowp. 102. Lord Mans-

field, in *Eldridge v. Knott*, Cowp. 115.

(4) Per Tindal, Ch. J., in *Doe v. Cooke*, 6 Bing. 180. See Matthews, on Presumptions, ch. xi. Reconveyances of Mortgages, 2 Sim. & Stu. 154. B. N. P. 10. Conveyances by trustees to *cestui que trust*, 8 T. R. 122; 1 J. & W. 620. The doctrine extends to constructive trusts, 12 Ves. 239, 251. Reconveyance to feoffer, *Tenny v. Jones*, 3 M. & S. 472. Conveyances from old to new trustees, 1 H. Bl. 446, 459. *Mesne assignments of leaseholds*, *Earl v. Baxter*, 2 Bl. 1228; 11 Ves. 350; *Anon.* 12 Vin. Ab. 223; Skinner, 77; per Le Blanc, 8 East, 266; per Lord Eldon, 1 Turn. 29. As to the point, whether fines or recoveries could not be presumed, without evidence directly pointing to them; per Bayley, J. and Lord

perty may be accounted for, and is consistent with the fact of there having been no conveyance, it seems proper to direct a jury to presume a conveyance or not, according to their actual belief on the subject. (1)

Conveyance  
from trustee.  
Outstanding  
terms.

With regard to the presumptions of a conveyance from a trustee to a *cestui que trust*, and of the surrender of outstanding terms, which are often necessary in order to constitute a legal title in an action of ejectment, considerable differences of opinion have been expressed. As these questions are somewhat removed from ordinary comprehension, it may be expected, that, although they must be submitted to a jury, yet that, in point of fact, they will ordinarily be decided upon principles of law by the Judge. A surrender of an outstanding term will, in general, be presumed, where the trustees ought to convey to the beneficial owner, (2) or where a term is satisfied, and is set up by a mortgagor against a mortgagee. (3) But such a presumption will not be made, where it would have been a breach of trust in the trustees to have surrendered the term; (4) or, in general, where the surrender would have been against the interests of the owner of the inheritance, especially if the term has been recognised as subsisting at a late period. (5) The mere fact of a term having been satisfied does not afford sufficient ground, upon which a jury can presume it surrendered. (6)

Tenterden, Ch. J., in *Doe v. Reed*, 5 B. & A. 237. It has been doubted, whether deeds can be presumed in register counties in opposition to the want of registration, *Doe v. Hurt*, 11 Price, 475. Surrender of lease not presumed, *Doe v. Thomas*, 9 B. & C. 288. Non-payment of tithe does not raise, as against a lay impropriator, a presumption to go to the jury of a grant of tithe to the landowner, *Bayley v. Drever*, 1 A. & E. 449. Presumption of disseverance of tithes, *Countess Dartmouth v. Roberts*, 16 East, 334, where Lord Ellenborough quotes a dictum of Lord Kenyon, that he would pre-

sume two hundred deeds if necessary.

(1) *Doe d. Fenwick v. Reed*, 5 B. & A. 233. It was said that the presumption of grants and conveyances had gone to too great a length. See *Levett v. Wilson*, 3 Bing. 115.

(2) By Lord Kenyon, *Doe v. Staple*, 2 T. R. 696. *Doe v. Sybourn*, 7 T. R. 2.

(3) *Ibid.*

(4) *Keene v. Dearden*, 8 East, 267.

(5) *Doe v. Scott*, 11 East, 478. See *Doe v. Wright*, 2 B. & A. 720.

(6) *Evans v. Bicknel*, 6 Ves. 184, *Sugd. V. & P.* 424; 7th ed.



It has been considered, that when acts are done or omitted by the owner of the inheritance and persons dealing with him as to the land, which ought not reasonably to have been done or omitted if the term existed in the hands of a trustee, a surrender may be presumed. (1)

The principal difference of opinion has existed in respect of the presumption of the surrender of terms, from the circumstance of their not being noticed in recent marriage contracts or other conveyances. It should seem that the Courts of Law had in some instances proceeded on an erroneous opinion as to the practice of noticing outstanding terms upon such occasions. But the Courts of Equity having expressed great dissatisfaction at the decisions of the Courts of Law as to this matter, the Courts of Law appear to have been desirous, in later cases, to assimilate their decisions to those of the Equity Courts. According to one of the most recent decisions upon the subject in the Court of King's Bench, Lord Tenterden observed, that the authorities which had been discussed had been much questioned; and, in answer to an inquiry made by him, whether a term, like that under consideration, had been usually noticed in a marriage settlement, having received an answer in the negative, he observed, "if that be so, there is no ground for presuming that this term, which was assigned to attend the inheritance, was ever surrendered." (2)

Where the ground for the presumption of a conveyance between private individuals is simply that of length of possession, it should seem that the Courts have imposed a restriction upon

(1) Per Lord Tenterden, 2 B. & A. 792. See further on this controverted subject, *Doe v. Hilder*, 2 B. & A. 782. *Bartleet v. Downes*, 3 B. & C. 616. *Doe v. Plowman*, 2 B. & Ad. 573. *Townsend v. Champernown*, 1 Y. & J. 538. *Doe d. Hammond v. Cooke*, 6 Bing. 174. *Day v. Williams*, 2 Cr. & J. 460. *Doe v. Putland*, Sugd. V. & P. 8th ed. 440. *Marq. Townsend v. Bp. of Norwich*, *ib.* 443. *Cholmondeley v. Clinton*, *ib.* 444. As-

pinal *v. Kempson*, *ib.* 446. Sugden's V. & P. 8th ed. 440 to 446. *Matthews on Presumptions*, 226 to 259.

(2) The subject is fully discussed, by Sir E. Sugden, in the last edition of his book on *Vendors and Purchasers* (9th ed. A. D. 1837). He concludes, that the profession are justified by the authorities in considering the law to stand as it did, before the decision in *Doe v. Hilder*.

**Livery.** the discretion of juries. It has been held, that possession of land for any period less than twenty years by a feoffee is not sufficient to found a presumption, that livery of seisin has accompanied the feoffment. (1)

**Licences.** Licences may be presumed after a shorter space of time than is ordinarily required for the presumption of actual conveyances. Thus where an inclosure had been made from a waste twelve or fourteen years, and had been seen by the steward of the lord from time to time, without objection being made, it was left to the jury to say, whether the inclosure was made by the lord's licence. (2)

**Bye-law.** Although there do not remain any traces of a bye-law in the corporation books, and although there cannot be any proof given of the loss of it, yet, upon evidence of constant usage, a jury may be directed to presume it's existence. Sixty years' usage has been considered evidence of a bye-law. (3)

**Presumptions in treason.** It has sometimes been laid down, that a conspiracy to levy war against the King, when proved, amounts, in presumption of law, to a compassing of the King's death; but, on the other hand, there are still higher and better authorities, both ancient and modern, for considering, that a jury are not bound to make such a presumption, unless they are satisfied, that the conspiracy was of such a nature as in it's consequences to occasion probable danger to the King's life. (4)

(1) *Doe d. Wilkins v. Marq. Cleveland*, 9 B. & C. 871. As to the presumption of livery of seisin, *Isack v. Clarke*, Roll. Rep. 132, pl. 9. *Biden v. Loveday*, Vern. 196. *Rees v. Lloyd*, Wightw. 123. The period of twenty years has been adopted by the Courts, in various instances, for the purpose of raising presumptions, in analogy, probably, to the statute of James; but, in regard to the proof of written instruments, by their production from the proper custody, without further proof of execution, the period of thirty years

has been adopted, 11 East, 504; 4 B. & A. 376; 5 T. R. 359; 2 M. & S. 337; 2 B. & C. 814. *Vide infra*, part 2.

(2) *Doe v. Wilson*, 11 East, 56. *Goodtitle v. Baldwin*, 11 East, 498. *Ditcham v. Bond*, 3 Camp. 525.

(3) See *Rex v. Head*, 4 Burr. 2518. *Rex v. Bird*, 13 East, 368. Per Lord Mansfield, in *Perkin v. Warden of the Co. of Cutlers*, 21 MSS. Serg. Hill, p. 65; 2 Ves. 330; B. N. P. 211; 4 Co. 78; Cowp. 110.

(4) See the authorities collected in Phillips's observations on Lord

Presumptions of the payment of money have been sanctioned in various cases. Where it has been usual between parties to make payments, that frequently become due, without taking written vouchers, and a long time has elapsed without any complaint being made of non-payment, the fact of payment may very properly be presumed. (1) If a landlord gives a receipt for the rent last due, it is to be presumed that all former rent due from the tenant has been paid. (2) Where a bill of exchange, negotiated after acceptance, is produced from the hands of the acceptor, subsequently to it's becoming due, the presumption is that the acceptor has paid it. (3)

Where a person has been the absolute owner of property, and he continues in possession of it till the time of his bankruptcy, he will be *prima facie* presumed to have had the reputed ownership of it, unless he has made the change of property notorious; but if he has never been the absolute owner,

Payment.

Reputed ownership.

Russell's case, in his abridgment of the State Trials; and Luders's tracts on Treasons. The charge of Chief Justice Eyre, in Hardy's case; his summing up in Horne Tooke's case; the summing up of Lord Ellenborough, in Watson's case, are in favor of treating the presumption as one of pure law.

(1) See *Lucas v. Novosilicaki*, 1 Esp. 296. *Sellen v. Norman*, 4 C. & P. 86. *Evans v. Birch*, 3 Camp. 10. *Topham v. Braddick*, 1 Taunt. 572.

(2) *Gilb. Ev.* 157.

(3) *Gibbon v. Featherstonehaugh*, 1 St. 225. *Pfiel v. Vanbatenberg*, 2 Camp. 439. See *Bembridge v. Osborn*, 1 St. 374. As to the presumption of payment arising from the production of a cheque, see *Boswell v. Smith*, 6 C. & P. 60. *Pearce v. Davis*, 1 M. & Ro. 365. *Egg v. Barnet*, 3 Esp. 196. *Gow*, 16; 4 Taunt. 293. *Lloyd v. Sandilands*, *Gow*, 16. That the payment of money does not, in general, raise the presumption of a loan, *Welsh v. Seabone*, 1 St. 474; *Carey v. Gerrish*, 4 Esp. 9; *Hol-*

*den v. Hartsink*, 4 Esp. 46. As to a presumption of gift to a relative, *Hick v. Keats*, 4 B. & C. 71. See further on the presumption of payment, *Cooper v. Turner*, 2 St. 207. 4 Taunt. 293. On the presumption of the satisfaction of judgments, warrants to confess judgment, decrees, statutes, recognizances, annuities, portions, legacies, liens for purchase money, quit rents, *Matthews on Presumptions*, ch. 19 & 20. *Willaine v. Gorges*, 1 Camp. 217. *Hulke v. Pickering*, 2 B. & C. 555. *Cowp.* 214. On the subject of the payment of bonds, see the statute 3 & 4 W. 4, c. 42. Before the statute, payment might have been presumed within twenty years, if circumstances concurred to fortify the presumption arising from lapse of time, as a settlement of accounts. *Colael v. Budd*, 1 Camp. 27. *Oswald v. Leigh*, 1 T. R. 270. The production by the assured of a policy, with an adjustment, and the name of the defendant struck off, does not prove payment, *Adams v. Sanders*, M. & M. 373.

it will be necessary to establish the fact of a reputed ownership by other means than proof of possession. (1)

Acceptance of  
benefit.

There are several branches of law, in which there are rules founded on the presumption that a party is willing to accept a benefit. Thus, it has been held, on the ground of this presumption, that a surrender immediately divests the estate out of the surrenderor, and vests it in the surrenderee, before notice or agreement. (2)

Ecclesiastical  
Courts.

Besides the presumptions which have been mentioned, there are various others, which have been adopted by the Courts of Equity and the Ecclesiastical Courts, but which are more seldom used in common law proceedings. (3)

Equity.

It would be impossible to include, within convenient limits, a notice of the various presumptions, which have received judicial sanction; upon the effect of which, useful observations may be found in the works of legal writers. Indeed the greater part of the rules of evidence is founded upon presump-

(1) *Lingard v. Messiter*, 1 B. & C. 312; *Storer v. Hunter*, 3 B. & C. 374.

(2) *Thompson v. Leach*, 2 Salk. 618; *Hargr. Co. Litt.* 337, b. n. 1. See *Tounson v. Tickle*, 3 B. & A. 31; 2 Salk. 618; 2 Swanst. 365; 5 Madd. 435.

(3) Presumptive revocation of a will from marriage and birth of a child, *Johnston v. Wharton*, 1 Phillim. 447; *Holway v. Clarke*, 1 Phillim. 339; *Emerson v. Boswell*, 1 Phillim. 342. Presumption that a testator has destroyed his will, where it is known to have been in his custody, and is not found after his death, *Rickards v. Mumford*, 2 Phillim. 24; 3 Phillim. 128, 552; 2 Hagg. 2 Ser. 266, 192. Presumption, that where a later will is destroyed, and a former one uncanceled, the former is not revived, *Wilson v. Wilson*, 3 Phillim. 543; *Glazier v. Glazier*, 4 Burr. 2512. So where a duplicate is left uncanceled, *Colvin v. Fraser*, 2 Hagg. 2 Ser. 266. The presump-

tion against a Will in the handwriting of a party benefited, 1 Phillim. 193; 2 Phillim. 323. Presumption against an unexecuted will, or an unwitnessed attestation clause, 2 Phillim. 122; 3 Phillim. 5, 628, 24, 524; 2 Phillim. 177; 1 Ad. 383. Presumption in favor of marriage, 2 Phillim. 54; 1 Phillim. 294. Presumption of the commission of adultery, under particular circumstances, *Elliot v. Elliot*, 1 Hagg. 1 Ser. 302. *Williams v. Williams*, 1 Hagg. 303; *Sir J. Astley's case*, 1 Hagg. 2 Ser. 716. For presumptions in Courts of Equity, see *Matthews on Presumptions*. Courts of Equity presume, in the case of tenant rights of renewal, that a new lease has been obtained with reference to the interest in the former lease. *Hargr. Co. Litt.* 290, b: n. 1, xi. that a legacy charged on real estate should not vest till the time when it is made payable, *Hargr. Co. Litt.* 237 a, n. 1.

tions; and consequently the subject of the present chapter receives illustration from nearly every other chapter of the present Work. (1)

## SECTION II.

*On the Relevancy of Presumptions.*

With respect to presumptions which are too remote to admit of any reasonable direction to a jury in regard to the issue which they have to try, a very nice exercise of discretion often devolves upon the Judge. It is his duty to confine the evidence to the points in issue, lest the attention of juries should be distracted, and the public time needlessly consumed; but in deciding that the evidence of any particular circumstance is not receivable upon this ground, he must impliedly determine, that no presumption to be drawn from that circumstance ought properly to have an effect upon the minds of the jury. (2) In several instances, rules have been established for the guidance of Courts of Justice upon this subject.

Irrelevant presumptions.

(1) See Bentham's *Rationale*, vol. iii. p. 598, authentication of writings by presumptions, *ex visu scriptiois*, *ex scriptis olim visis*, *ex comparatime scriptorum*, *ex custodia*, *ex tenore*; *ex visu officiali*, and the deauthentication of writings by the like presumptions. In the same volume will be found many valuable remarks on the different species of circumstantial evidence, which are of the most ordinary occurrence. On the presumptions of dates of letters and promissory notes, *Hunt v. Massey*, 3 R. & M. 109. *Smith v. Battens*, 1 M. & R. 341. Custody of letter by executrix, *Drew v. Durnborough*, 2 C. & P. 198. Of receipt of letter, *Kieran v. Johnson*, 1 St. 109. Presumption of negligence from the overturning of a coach, *Christie*

*v. Gregg*, 2 Camp. 79; *Israel v. Clark*, 4 Esp. 259. Of the presumption of knowledge of the contents of books, or the usage of trade, *vide infra*, part 2; and *supra*, Admissions. On the presumption of acquaintance with the law, *Evans's Pothier*, 392. Presumptions after verdict, *Spieries v. Parker*, 1 T. R. 141.

(2) In some instances, Judges have drawn the line as to the length of time after a robbery, which may render the possession of stolen goods relevant, *Anon.* 2 C. & P. 459. In *Mann v. Lang*, 3 A. & E. 705, all the Judges appear to have thought the probate admissible evidence, though several of them appear to have thought the presumption arising from it of the weakest description.

Other con-  
tracts.

It is considered, that, in general, no reasonable presumption can be formed as to the making or executing of a contract by a party with one person, in consequence of the mode in which he has made or executed similar contracts with other persons. Where the question between a landlord and his tenant is, whether the rent was payable quarterly or half-yearly, it has been held irrelevant, to consider what agreements subsisted between the landlord and other tenants, or at what time their rents would become due. (1) So, where the question was as to the quality of beer to be furnished by the plaintiff to the defendant, it was held, that evidence could not be admitted of the quality of beer supplied by the plaintiff to other persons. (2)

Other transac-  
tions, to show  
knowledge.

On the other hand, it may frequently be very proper, and in some cases absolutely necessary, to look beyond the transaction, which is the immediate subject of inquiry, into previous transactions, for the purpose of making a just inference as to the knowledge of the parties, their motives, or intentions. (3) The case of *Hunter v. Gibson and Johnson*, (4) affords an instance of this kind. That was an action by an indorsee against the defendants, as acceptors of an instrument purporting to be a bill of exchange; a question arose on the third count, which stated the bill to be payable to bearer, under the following circumstances: It appeared in evidence, that the name of the person mentioned as payee was merely fictitious, but this fact was not known to the plaintiff; and for the purpose of showing, that the defendants at the time of their acceptance knew the name in the bill to be fictitious, or that the defendants had given authority to the drawer, to draw the bill in question payable to a fictitious person, the plaintiff proposed to prove, that the defendants had given a general authority to the

(1) *Carter v. Pryke, Peake*, 94. For other examples, *Spenceley v. De Willot*, 7 East, 108. The point frequently arises at the Quarter Sessions, where it is attempted to prove the terms on which a master hired a particular servant, by the manner in which he hired other servants.

(2) *Holcombe v. Hewson*, 2 Campb. 391. See *Balutti v. Serani, Peake*, 142. *Viney v. Barra*, 1 Esp. 293, forgery of another acceptance.

(3) See *infra*, as to the proof of knowledge in issuing counterfeit money.

(4) 2 H. Bl. 187, 288, 290, 295.

drawer to draw bills of exchange upon them, to be made payable to fictitious persons, and evidence to this effect was produced; the counsel for the defendants objected to this evidence, on the ground that it had no relation to the particular bill in question, and that the facts of any particular transaction could not legally be inferred from circumstances which applied wholly to other transactions. Lord Kenyon, who tried the cause, admitted the evidence; upon which the counsel for the defendants tendered a bill of exceptions. The Court of King's Bench gave judgment for the defendant in error. A writ of error was then brought in the House of Lords; and the question on the admissibility of the evidence was referred to the Judges. On this question there was a division among the Judges: but the majority of them being of opinion that the evidence ought to have been received and left to the jury, the judgment below was affirmed.

With respect to the relevancy of a presumption, that a customary right exists in one place, from the fact of it's being proved to exist in another, it is to be observed, that when a right is claimed by custom in a particular manor or parish, proof of a similar custom in an adjoining parish or manor is not, in general, admissible evidence. (1) In the *Duke of Somerset's* case, Lord Chief Justice Raymond said, he had always looked upon it as a settled principle in the law, that the customs of one manor could not be given in evidence to explain the custom of another manor; "for if this kind of evidence were to be allowed, the consequence seems to be, that it would let in the custom of one manor into another, and in time bring the customs of all manors to be the same." And in addition to this argument of inconvenience, the objection taking to the evidence in that case, namely, that it was inapplicable to the point in dispute, appears to be very strong; customs being different in different manors, and in their nature distinct. Unless, therefore, some connection or relation is proved to have existed between them, as by show-

Proof of customs in other manors, &c.

(1) *Duke of Somerset v. France*, 1 Str. 661. *Ruding v. Newell*, 2 Str. 957. *Furneaux v. Hutchings*, Cowp. 807. By Buller, J., in *Noble v. Kennoway*, 2 Doug. 512, S. P.; by Wood, B., in *Doe d. Foster v. Sisson*, 12 East, 63, S. P. *Erekin v. Ruffle*, 3 Gwill. 965.

ing, that they were all formerly holden under the same lord, or that the one manor was anciently parcel of the other manor, (1) such evidence is not admissible.

Rule in question of tenure :

But several cases appear to have determined this point, that, where all the manors within a certain district are held by the same peculiar tenure, and a question arises in any one of them upon an incident to the tenure, evidence may be given of the usage which prevails in any of the other manors within the district. The first reported case of this kind is *Champion v. Atkinson*, (2) where the question was, whether a general fine was due to an infant admitting lord during his minority, and the defendants were allowed to give in evidence, upon the trial of this issue, that other adjoining manors had the same custom, not to pay to the lord before he attained his full age ; similar evidence was there said to have been received, on a question of copyhold tenure, between certain manors in Middlesex.

On the authority principally of this case of *Champion v. Atkinson*, the *Duke of Somerset's* case (3) was decided. On a trial at bar in that case, where the issue was, whether a general fine was due from the tenants of certain manors in Cumberland to the Duke as next admitting lord, the Court after much argument received evidence, that the same fines had been paid in similar cases to the lords of other manors. Lord Chief Justice Raymond and Reynolds, J., laid down the general rule as above stated, and were strongly against admitting the evidence ; but afterwards agreed to receive it, on the authority of the precedent in *Keble*, and of cases said to have been so ruled on the northern circuit. Fortescue J., the only Judge then present, thought the evidence admissible, and made a distinction between the *custom* and the *tenure* of a manor ; and as the question, there to be tried, merely concerned the tenure of the

(1) *Moulin v. Dalison*, Cro. Car. 484.

(2) 3 Keb. 90, on trial at bar.

(3) *Duke of Somerset v. France*, 1 Str. 658. See also *Lowther v. Raw* and others, Fortesc. 44, 55, S. P., on appeal to the House of Lords from

the judgment of Lord Talbot, Ch. ; Dean and Chapter of Ely v. Warren, 2 Atk. 189, S. P. See also Cowp. 807, 808 ; 5 T. R. 31 ; and *Rex v. Ellis*, 1 Maule & Selw. 662. Lord Barclay's case, *Hale de jure maris*, 35.



plaintiff's manors, he was of opinion that it would be proper to inquire, what where the qualities that attended other estates holden by the same tenure.

In the case of *Furneaux v. Hutchins* on a question relative to the custom of tithing, (1) Lord Mansfield, after laying down the general rule, that "proof of the custom in one parish is not evidence to affect another parish," adds this qualification, "unless the custom is laid as a general custom of the country." Thus, where half of a river belongs, by the constant custom of the country, to the lords of the manors on each side of the water, proof of the custom in one manor is evidence of the same customary right in another. (2) It is evidence of a custom pervading one common district of manors.

or custom of  
the country.

Where in each of several submanors, part of the same district and belonging to the same lord, there appeared to be a certain peculiar class of tenants answering the same description, and to whom their tenements were granted by similar words, it was held, that evidence of the rights, which had been enjoyed by the tenants of one manor was admissible to shew, what rights the tenants were entitled to in another. (3)

In like manner acts of ownership in one place may sometimes afford a legitimate presumption of the right of ownership in another. In an action of trespass, the plaintiff claimed the whole bed of a river flowing between his land and the land of the defendant, the defendant contending that each was entitled *ad medium filum aquæ*. It was held, that it was allowable for the plaintiff to give in evidence acts of ownership exercised by him upon the bed and banks of the river on the defendant's side lower down the stream, and where it flowed between the plaintiff's land and a farm adjoining the defendant's land, and

Acts of owner-  
ship in other  
lands.

(1) 1 Cowp. 808.

(2) 1 Maule & Selw. 662.

(3) *Rowe v. Brenton*, 8 B. & C. 758. The matter in dispute was neither a question of tenure nor of custom, as to which some nice distinctions are taken by Fortescue,

J., in *Duke of Somerset v. France*. That proof of the manner in which a particular trade is carried on at one place, is evidence as to the course of that particular trade in another place. *Noble v. Kennaway*, 2 Doug. 510.

also of repairs done by the plaintiff to a fence which divided that farm from the river, and which was in continuation of a fence dividing the defendant's land from the river. (1) It was said by the Court, that the acts of ownership in question might reasonably lead to the inference, that the entire edge and bed of the river, and consequently the part in dispute, belonged to the plaintiff. In the previous case of *Doe d. Barrett v. Kemp*, (2) it had been decided in the Exchequer Chamber, upon a question whether a piece of waste land between a highway and inclosures belonged to the plaintiff, the owner of the adjoining inclosure, or to the lord of the manor, that the lord might give evidence of grants by him of waste land terminating in a common, between the road and the inclosures of other persons at a distance from the spot claimed by the plaintiff; but that such evidence must be confined to the waste adjoining the road which passed by the spot so claimed.

The case of *Sir T. Stanley v. White*, (3) may here be mentioned as a leading authority upon this subject. This was an action of trespass for cutting down the plaintiff's trees; the defendant pleaded his soil and freehold in the close upon which the trees were growing. The plaintiff replied, that the trees were his trees and freehold. It appeared on the trial, that the trees in question grew in a woody belt of considerable extent, entire and undivided, which encircled the plaintiff's manor, and lay contiguous to a number of closes belonging to several owners, one of which closes was that of the defendant. Evidence was admitted of several acts of ownership, in dif-

(1) *Jones v. Williams*, 2 M. & Wel. 331, where the nature of this kind of evidence is explained by Parke, B., see *Evans v. Butt*, K. B. Hil. T. 1837.

(2) 2 Bing. N. C. 103. 7 Bing. 332, a *venire de novo* was granted, because the Court considered that they could not assume that all the pieces of waste, with respect to which evidence was received, lay on the sides of a road or roads terminating in a large common. They were, however, of opinion that evidence was admissible of grants of

parcels of one and the same waste, lying on both sides of the road, although the continuity of the waste was interrupted for a short distance by the intervention of houses. The same principle is recognised in *Tyrwhitt v. Wynne*, 2 B. & A. 554, where leases were rejected on account of no previous proof being given that the *locus in quo* was part of a larger district to which these leases applied.

(3) 14 East, 332. See also *Bryan v. Winwood*, 1 Taunt. 208. *Hollis v. Goldfinch* 1 B. & C. 218, 219.

ferent parts of the belt, by those under whom the plaintiff claimed, which had been acquiesced in by the owners of the adjoining land. And the Court of King's Bench afterwards, on a motion for a new trial, adjudged the evidence to have been properly admitted, as evidence of the general right through the whole extent of such entire undivided inclosure, which might be presumed to have belonged formerly to one owner. This appears to be the true principle, on which the proposed evidence, in that case, was admissible. For, generally speaking, acts of ownership, submitted to by the holder of one portion of land, cannot be proof that the person exercising them has any right to the adjoining land. (1)

Though it is a general rule, that a custom of tithing, &c. in one parish will not be evidence of a custom in another, yet such an inquiry may sometimes be very proper in cross-examination. Thus, in an action by a rector for tithes, where the point in issue is, whether there exists a modus of a certain sum of money for a particular farm in a township within the parish, the defendant will not, in general, be allowed to inquire, whether other farms in the same township are not subject to the same payment. But where a modus is alleged on one side, it may be relevant on the other side to make an inquiry of this nature, for the purpose of shewing that such payments cannot be a modus, consistently with the evidence which has been previously adduced. This was adjudged to be admissible in the case of *Blundell v. Howard*. (2) The question there was not put by the defendant with a view of supporting the modus set up by him, but was put by the plaintiff, in order to shew that this and similar payments by the occupiers of different tenements were merely portions of a sum in gross paid throughout the township by way of composition, and could not be a modus, since the ecclesiastical surveys,

Inquiry in  
cross-examina-  
tion.

(1) See 1 Barn. & Cress. 218, 222.

(2) 1 Maule & Selw. 292. See *Rex v. Stallard*, 7 C. & P. 263, where an inquiry as to what other

persons had said of the prosecutor became relevant on account of an inquiry respecting the prisoner's expressions concerning him.

which had been produced on the part of the rector, were entirely silent as to any *modus co-extensive* with the township.

Evidence of  
character.  
Civil suits.

The character of the parties to a civil suit affords, in general, such a weak and vague inference as to the truth of points in issue between them, that it is not usual to admit evidence of this description. Thus, in an action of ejectment by an heir at law, to set aside a will for fraud and imposition committed by the defendant, witnesses cannot be examined to the defendant's good character. (1) So, on the trial of an information against the defendant for keeping false weights where it was proposed to call witnesses on behalf of his character, *Eyre, C. B.*, ruled that such evidence was not admissible in a civil suit. (2) "The offence imputed is not," he said, "in the shape of a crime. To admit such evidence would be contrary to the true line of distinction, which is this, that in a direct prosecution for a crime, evidence of character is admissible, but when the prosecution is not directly for the crime, but for the penalty, it is not. If evidence to character were admissible in such a case as this, it would be necessary to try character in every charge of fraud upon the Excise and Custom-house laws."

Character in  
issue.

Where, in a civil suit, character is a matter in issue, there the evidence of it ceases to be of a circumstantial nature, and there can be no objection to receiving it. Various questions, however, have arisen in civil suits as to the point, whether the character of the parties, or of a third person was directly in issue or not.

Adultery.

In actions for adultery or seduction, the wife's or daughter's general conduct, if not their general character in regard to chastity, is directly in issue; and accordingly, it seems that general evidence of bad character is admissible in such actions; (3) whereas in actions for defamation, it appears, ac-

Defamation.

(1) *Goodright d. Farr v. Hicks*, B. & P. 532.  
B. N. P. 296. B. N. P. 298. (3) *Dodd v. Norris*, 3 Campb.  
(2) *Attorney Gen. v. Bowman*, 2 519. *Gardiner v. Tadis*, 1 Selw.

according to the later authorities, that general evidence of the plaintiff's good or bad character is irrelevant. (1) In actions for adultery or seduction, general evidence of the good character of the wife or daughter is admissible, where the defendant has endeavoured to impeach it by general evidence upon cross-examination, or by calling witnesses; (2) but it may be doubted, whether the plaintiff in reply can give general good character in evidence, where the defendant's evidence has not been general, but has related to particular instances, especially where the imputations are made in the course of the daughter's cross-examination, who has therefore an opportunity of explaining them away upon re-examination. (3) It seems that, according to the later authorities, evidence of the plaintiff's bad character is not admissible in an action for a malicious prosecution. (4)

Seduction.

Malicious prosecution.

In criminal matters, evidence of character frequently affords a material presumption in regard to the perpetration of offences. Thus, where the charge is that of rape, or of an assault with an attempt to commit a rape, the general bad character of the prosecutrix may, under the circumstances of particular cases, afford a just inference as to the probability of her having consented to the commission of the act for which the prisoner is indicted. Accordingly, upon the trial of indictments for such offences, evidence is admissible, on the part of the prisoner,

Criminal matters.  
Character of prosecutor.

N. P. 25. *Roberts v. Malsten*, B. N. P. 296. *Elsam v. Faucett*, 2 Esp. 562. As to the husband's bad character, *Bromley v. Wallace*, 4 Esp. 237. The authorities rather imply, than directly shew, that general hearsay evidence of bad character, as distinguished from positive evidence of general conduct, is receivable, either where the general issue is pleaded, or where there are pleas of justification.

(1) *Cornwall v. Richardson*, R. & M. 305. *Stuart v. Lovell*, 2 St. 93. *Jones v. Stevens*, 11 Price, 235. 2 St. 93; 2 Campb. 251. *Waithman v. Weaver*, D. & R., N. P. C. 10.

(2) *Bamfield v. Massey*, 1 Camp. 460. *Dodd v. Norris*, 3 Camp.

519.

(3) *Bamfield v. Massey*, 1 Camp. 460. *Dodd v. Norris*, 3 Camp. 519. *Bate v. Hill*, 1 C. & P. 100. See *King v. Francis*, 3 Esp. 116. It may be observed, that it is often impossible to give a satisfactory answer to a charge unexpectedly made, except by general evidence. See *Rex v. Clarke*, 2 St. 242, where general evidence of character was received after the prosecutrix's character had been impeached upon her cross-examination.

(4) The evidence was admitted by Lord Kenyon, in *Rodguer v. Tadmire*, 2 Esp. 721; rejected by Wood, B., in *Newsam v. Carr*, 2 St. 70.

that the woman bore a notoriously bad character for want of chastity and common decency. (1) It appears also, that, at least, upon trials for rape, evidence is admissible, that the woman had been before criminally connected with the prisoner. (2) But it seems that evidence of particular facts cannot, in general, be received to impeach the chastity of the woman; as, that, previously to the commission of the offence, she had a criminal connection with other persons. (3) It has been held, the woman in a prosecution for rape is not bound to answer questions tending to criminate and disgrace herself; as, whether she had not before connection with other persons, or with a particular person. (4)

Character of  
prisoner.

In trials for felony and high treason, and in trials also for misdemeanors, (where the direct object of the prosecution is to punish the offence,) the prisoner is always permitted to call witnesses to his general character; and in every case of doubt, proof of good character will be entitled to great weight. The inquiry as to the prisoner's general character ought manifestly to bear some analogy and reference to the nature of the charge against him. On a charge of stealing, it would be irrelevant and absurd to inquire into the prisoner's loyalty or humanity; on a

(1) In *Rex v. Clarke*, 2 St. 244. This is stated by Holroyd, J., to be the law as well upon indictments for an assault with intent to commit a rape, as for the capital charge; and it is not necessary that the woman should have been previously interrogated on the subject. *Ibid.*

(2) 2 St. Ev. 216, citing a case before Wood, B., York Sum. Ass. 1812.

(3) Per Holroyd, J., in *Rex v. Clarke*, 2 St. 244. Mr. Justice Holroyd also ruled, that the woman's answers as to particular facts would be conclusive; but it is to be observed, that this is treating the question as merely discrediting the witness, and not as relevant to the issue. *Vide infra*, part 3, examination of witnesses. The same Judge also admitted evidence of the woman's conduct and situation since the commission of specific felonies admitted by her in cross-

examination. *Rex v. Hodgson*, R. & R. 211, on the alleged ground that the prosecutrix could not be prepared to answer evidence of particular facts. Perhaps it may be considered that the question of the woman's chastity is not directly in issue upon such charges, as it is in actions for crim. con. and seduction. The determination of this question may, however, afford a material inference as to the truth of the charge; and the alleged objection to the evidence is in some degree obviated by the power, as in actions of seduction, of producing general evidence of good character in reply.

(4) *Rex v. Hodgson*, R. & R. 211. It may be observed, that the questions do not merely tend to discredit the witness, but are also relevant to the issue. *Vide* part 3, *Examination of Witnesses*.

charge of high treason, it would be equally absurd to inquire into his honesty and punctuality in private dealings. Such evidence relates to principles of moral conduct, which, however they might operate on other occasions, would not be likely to operate on that which alone is the subject of inquiry; it would not afford the least presumption, that the prisoner might not have been tempted to commit the crime for which he is tried, and is therefore totally inapplicable to the point in question. The inquiry must also be as to the *general* character: for it is general character alone, which can afford any test of general conduct, or raise a presumption that the person, who had maintained a fair reputation down to a certain period, would not then begin to act a dishonest unworthy part. Proof of *particular* transactions, in which the defendant may have been concerned, is not admissible, as evidence of his general good character. What, then, is evidence of general character? The best medium of proof is, by shewing how the person stands in general estimation; proof that he is reputed to be honest, is evidence of his character for honesty, and the species of evidence most properly resorted to in such inquiries. It frequently occurs, indeed, that witnesses, after speaking to the general opinion of the prisoner's character, state their personal experience and opinion of his honesty; but when this statement is admitted, it is rather from favour to the prisoner, than strictly as evidence of general character. (1) In cases where the intention forms a principal ingredient in the offence, a wider scope is allowed. On a charge of murder, for instance, expressions of good will and acts of kindness on the part of the prisoner towards the deceased, are always considered important evidence, as shewing what was his general disposition towards the deceased, from which the jury may be led to conclude, that his intention could not have been what the charge imputes.

Upon what  
points.

General cha-  
racter.

Particular  
acts.

It may, perhaps, be thought that proof of bad character, though it be not receivable according to the rules of evidence, would afford almost as reasonable an inference in favor of a prisoner's guilt in doubtful cases, as evidence of good character

Character,  
effect of.

(1) See 31 Howell, 190, 310.

conveys in favor of his innocence; that the testimony, as to the general character of a prisoner, is, in most instances, extremely vague; and even supposing the excellence of a prisoner's character, till within a short time before the charge, to be clearly established, the inference as to his innocence is not of a very cogent nature. It is also to be considered, that witnesses to character do not incur any risk of an indictment for perjury.

**Practice.**

It is not the practice to cross-examine witnesses to character, (1) or to make the calling of them a ground for addressing the jury on the part of the prosecution; though the practice in these respects is not imperative, and, in particular instances, it may be deviated from with propriety. (2) It is expressly provided by the statute 6 & 7 W. 4, c. 111, that if upon the trial of any person for felony, such person shall give evidence of good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of a conviction of such person for a previous felony, and the jury shall inquire concerning such previous conviction, at the same time that they inquire concerning the subsequent felony.

**Presumptions  
in criminal  
cases.**

In criminal cases, it is peculiarly the duty of Courts of Justice to prevent evidence being given which would support a charge against the prisoner, of which he is not previously apprised, under the pretext of its affording some presumption as to the offence which is the subject of the indictment. In treason, therefore, no evidence is to be admitted of any overt act that is not expressly laid in the indictment. This was the rule at common law: and it is again prescribed and enforced by the statute of W. 3, which contains an express provision to that effect, (3) in consequence of some encroachments that had been made in several state prosecutions. (4) The meaning of the rule is, not that the whole detail of facts should be set forth, but that no overt-act, amounting to a distinct independent charge,

**Treason.****Proof of overt  
acts.**

(1) *Rex v. Hodgkiss*, 7 C. & P. 298, unless the prosecutor has some distinct charge to which to cross-examine the witness.

(2) 7 C. & P. 676. *Rex v. Stannard*, 7 C. & P. 673. That a

right of reply is given as to the whole case, *Rex v. Whiting*, 7 C. & P. 771.

(3) 7 W. 3, c. 3, s. 8.

(4) *Foster*, Cr. L. 245, 246.



though falling under the same head of treason, shall be given in evidence, unless it be expressly laid in the indictment; but still, if it conduce to the proof of any of the overt-acts which are laid, it may be admitted as evidence of such overt acts. (1) With this view, the declarations of the prisoner, and seditious language used by him, are clearly admissible in evidence, as explaining his conduct, and shewing the nature and object of the conspiracy. (2) And acts of treason, tending to prove the overt acts charged, though committed in a foreign country, may be given in evidence. (3)

On the trial of an indictment for burglary and larceny, (4) it appeared upon the evidence, that the prisoners might have entered the house before it was dark, and that they had not taken any part of the goods at the time when they were discovered in the house, upon which the counsel for the prosecution proposed to give evidence of a larceny in the house, committed by the prisoners on a preceding day: but the Court rejected the evidence, on the ground that it tended to prove a felony of a totally distinct kind, which had no reference to the subject-matter of the prosecution; the prisoners were, therefore, acquitted on this charge, but were afterwards indicted for the other offence, and convicted

But although it is usual to confine the prosecutor to one single act of felony, yet, when the character of the particular act charged against the prisoner is to be collected from other acts done by him, all of them constituting one entire transaction, or mutually explanatory of each other, it is discretionary in the Judge to allow the prosecutor to go into the whole. (5) Thus,

(1) *Id.* 9, 246. *Vaughan's case*, 5 St. Tr. 2 fol. ed. S. C. 13 *Howell's St. Tr.* 453. *Deacon's case*, 9 St. Tr. 8 fol. ed. S. C. 15 *Howell's St. Tr.* 747.

(2) *Rex v. Watson*, 2 Starkie, N. P. C. 134. So on an indictment for sending a threatening letter, a subsequent letter from the prisoner, explanatory of that stated on the record, is admissible. *Robinson's case*, 2 East's P. C. 1112.

(3) *Fost. Cr. L.* 10. *Deacon's case*, 9 St. Tr. 8, fol. ed. S. C. 15 *Howell's St. Tr.* 747.

(4) *Rex v. Vandercomb and Abbott*, 2 Leach, Cr. Ca. 816.

(5) *Ellis's case*, 6 B. & C. 145, several purloinings from a till. *Egerton's case*, R. & R. 376, an infamous accusation on the following evening. *Vowkes's case*, R. & R. 531, two malicious shootings. *Mogg's case*, 4 C. & P. 364. *Rex*

Burglary.

Several felonies.

in a case of robbery, where the prisoners came with a mob to the prosecutor's house, and one of them went up to the prosecutor, and civilly advised him to give them something to get rid of them—to shew that this was not *bond fide* advice, but in reality a mode of robbing the prosecutor, evidence was allowed to be given of other demands of money made by the same mob at other houses, at different periods of the same day, both before and after the particular transaction, when any of the prisoners were present. (1) A case is cited by Lord Ellenborough, in *Whiley's case*, where a man committed three burglaries in one night, and stole a shirt in one place and left it at another, and they were all so connected, that the Court heard the history of the three burglaries. (2)

Proof of other acts as evidence of intention.

In offences which consist in the guilty knowledge or intention of a prisoner, it is frequently necessary to examine into collateral facts, in order to arrive at a just conclusion upon a matter, which must necessarily depend altogether on presumptive evidence. Thus, in a prosecution for uttering a bank-note, bill, or promissory note, with knowledge of it's being forged, proof that the prisoner had uttered other forged notes or bills, whether of the same kind or of a different kind, (3) or that he had other forged notes or bills in his possession, (4) is clearly admissible, as shewing that he knew the note or bill in question

*v. Moore*, 2 C. & P. 235. *Rex v. Long*, 6 C. & P. 179, firing three ricks, for which there were separate indictments.

(1) *Winkworth's case*, 4 C. & P. 444, upon a special commission, after communicating with Lord Tenterden.

(2) 2 Leach, 985. 1 New R. 92.

(3) *Rex v. Wylie*, 1 New Rep. 92. *Rex v. Ball*, 1 Camp. 324. *Russ. & Ry. Cr. Ca. 132*, S. C. That it is not necessary that the other forged notes should be of the same description, see *Kirkwood's case*, *Lewin's Cr. Ca. 103*. Per *Hullock, B.*, in *Hodgson's case*, *Lewin's Cr. Ca. 103*. The point was doubted in *Millard's case*, R. & R. 245, n. jud. See *Bayley on Bills*, 4th ed. 460. In *Rex v. Balls*, Mo. Cr. Ca.

470, on an indictment for engraving the notes of a foreign prince, evidence of engraving the notes of another foreign prince was held admissible.

(4) *Rex v. Hough*, *Russ. & Ry. Cr. Ca. 120*. *Rex v. Rowley*, *Bayley on Bills*, 447. The forgery of the other notes or bills must be distinctly proved; and they ought to be produced, *Rex v. Millard*, *Bayley on Bills*, 449. *Russ. & Ry. Cr. Ca. 245*, S. C. *Phillips's case*, *Lewin*, 106, where the point was doubted and the evidence received; the notes had been destroyed. It would seem that presumptive evidence of forgery, as that the prisoner destroyed the note, ought to be received.

to be forged. And on a prosecution for uttering counterfeit money, the fact of the prisoner having other counterfeit money upon him, or of his having uttered other pieces of money of the same kind, is, according to common practice, evidence of his having known that the money, which he is charged with uttering, was counterfeit; (1) and proof of the prisoner's conduct in such other utterings, (as, for example, that he passed by different names,) is, for the same reason, clearly admissible. (2) Such evidence, far from being foreign to the point in issue, is extremely material; for the head of the offence charged upon the prisoner is, that he did the act with knowledge: and it would seldom be possible to ascertain, under what circumstances the uttering took place, (whether from ignorance, or with an intention to commit a fraud,) without inquiring into the demeanor of the prisoner in the course of other transactions. The more detached in point of time the previous utterings are, the less relation they will bear to that stated in the indictment; and the question then would be, whether the evidence is sufficient to warrant the inference of knowledge at one time, from such particular transactions at another time. (3) That may be thought a question to be left, in most instances, at least, to the jury. But whatever weight the evidence may have, (which is quite another consideration,) it is, in general, admissible; not as evidence of another offence, but simply of another transaction, in which the prisoner was engaged, affording a reasonable presumption as to his conduct, with regard to the offence with which he is charged.

Uttering other  
notes or money.

It may be thought that collateral evidence of facts, occurring

Subsequent  
facts.

(1) 1 New Rep. 95. 1 Russ. on Crimes, 85.

(2) See *Rex v. Millard, R. & R.* 245. *Bayley on Bills*, 449. *Tattershall's case*, cited per Lord Ellenborough, 2 Leach, 984. *Phillips's case*, *Lewin*, 105.

(3) 1 New Rep. 94. It would seem that the evidence was not the less admissible, because the other forged notes are the subject, at the time, of other indictments; though doubts have been entertained as to

this point. *Kirkwood's case*, *Lewin's Cr. Ca.* 103. *Hodgson's case*, *Lewin's Cr. Ca.* *Ibid.* *Rex v. Smith*, 2 C. & P. 633. *Rex v. Long*, 6 C. & P. 179.

It has been held, that evidence of what the prisoner has said at a time collateral to a former uttering, to show that what he said at the time of a former uttering was false is not receivable, *Phillips's case*, *Lewin*, 106.

soon after the offence with which a prisoner is charged, may sometimes afford as reasonable a presumption of guilty knowledge, as when the facts occurred at some time before the offence. Upon an indictment for uttering a bill with a forged acceptance, knowing it to be forged, it was proposed to give in evidence other forged bills, precisely similar, with the same drawers' and acceptors' names, uttered by the prisoner about a month after the uttering of the bill mentioned in the indictment. Mr. Justice Gaselee, after consulting Alexander, C. B., was disposed to allow the evidence to be received, but said that he would reserve the point for the opinion of the Judges; upon which the counsel for the prosecution declined to press the evidence. (1) It is to be observed, however, in this case, that the similarity of the notes shewed, that they originated with one person; and, in a previous case of an indictment for uttering a forged bank note, where the prosecutors offered to prove the uttering of another forged note, five weeks after the uttering which was the subject of the indictment, the Court, (consisting of Ellenborough, C. J., Thompson, C. B., and Lawrence, J.,) held that the evidence was not admissible, unless the latter uttering was in some way connected with the principal case, or unless it could be shewn that the notes were of the same manufacture. (2)

Malicious  
shooting.

Upon other proceedings, besides prosecutions for forgery, or the uttering of forged notes or counterfeit coin, it is frequently material to give evidence of other acts, not in issue, in order to raise a presumption as to the intent of the prisoner, in committing the act for which he is indicted. Thus, upon an indictment for maliciously shooting, evidence was allowed to be given, that the prisoner, about a quarter of an hour before the shooting with which he was charged, intentionally shot at the prosecutor, (3) the whole being one continued transaction in the prosecution of the malicious intent of the prisoner. So,

(1) Smith's case, 4 C. & P. 411.

(2) Taverner's case, 4 C. & P. 413, n. On a charge for sending a threatening letter, or of publishing a libel, acts done by the prisoner subsequently to the offence charged, are admissible to shew the *animus*.

*Vide infra*. In like manner, subsequent felonies have been given in evidence to explain a preceding one, Egerton's case and Winkworth's case, *supra*, p. 493, 494.

(3) Vowkes's case, R. & R. 531.

on a charge for sending a threatening letter, other letters written by the prisoner, both before and after that for which he is indicted, may be read in evidence, for the purpose of explanation. (1) And, in like manner, in actions for libel or slander, it has been held that other libels or words may be given in evidence, occurring both before and after the subject of the action, in order to shew the *animus* of the defendant. (2)

Threatening letter.

Libel.

Upon an indictment for receiving stolen goods, which had been all stolen at the same time, but received at different times, the prosecutor was put to his election of some particular act of receiving; but it was held, that evidence might have been given of the prisoner having in his possession, and of having pledged and disposed of, other articles of the stolen property, in order to show his guilty knowledge, as all the property had been stolen from the same persons, and had been brought to the prisoner by the prisoner indicted with him for the theft. (3)

Receivers.

On an indictment against several prisoners, for a conspiracy to carry on the business of *common cheats*, proof is admissible that the prisoners, at a different time, made similar representations to other tradesmen besides those named in the record, (4) cumulative instances being necessary to prove the offence. The same sort of evidence is allowed in a prosecution for barratry, and, as before mentioned, in prosecutions for the greatest of

Conspiracy to cheat.

(1) Robinson's case, 2 East's P. C. 1110; 2 Leach, 749.

(2) Charlton v. Barrett, Peake, 22. Rex v. Pearce, Peake, 75, 124, 166. Rastell v. Macquesta, 1 Camp. 49, n. Stuart v. Lovel, 2 St. 93, subsequent publications. Lord Ellenborough observed, that the law would be the same upon an indictment. Chubb v. Westley, 6 C. & P. 436. Plunkett v. Cobbett, 5 Esp. 136; 2 Camp. 73, n.; 3 C. & P. 312; 2 Camp. 72, 73, n.; 5 Esp. 136; 2 St. 457; 3 B. & C. 113; R. & M. 422. Proof of collateral matters in actions for malicious prosecution, to shew malice, Caddy

v. Barlow, 1 Mann. & Ry. 275, 1 Str. 691.

(3) Dunn's case, Mo. Cr. Ca. 150. The report contains a marginal note, indicating that the evidence had been confined to acts previous to that on which the prosecutor had elected to proceed. The same point has occurred in respect of utterings subsequent to that for which a prisoner is indicted. That the possession of property may afford presumptive evidence of the commission of arson, Rickman's case, 2 East's P. C. 1035.

(4) Rex v. Roberts, 1 Camp. 400.

Murder.

all offences, high treason. The same kind of proof is constantly admitted in trials for murder; in which former grudges and antecedent menaces are evidence of the prisoner's malice against the deceased.

Conspiracy to riot.

On the trial of an indictment against several persons for a conspiracy, in unlawfully assembling for the purpose of exciting discontent and disaffection, it would be irrelevant to inquire, on behalf of the defendants, what the conduct of those employed to disperse the meeting may have been at the time of the dispersion, if no evidence has been previously offered, on the part of the prosecution as to the conduct of the meeting at that time or subsequently; for the conduct of the dispersers of the meeting can have no bearing on the intention and object of the meeting itself; in other words, it is irrelevant to the matters in issue. (1) In such a prosecution, as the material points for the consideration of the jury are, the general character and intention of the assembly, and the particular case of each defendant as connected with that general character, it would be relevant to prove, on the part of the prosecution, that bodies of men came from different parts of the country to attend the meeting, arranged and organized in the same manner, and acting in concert. It would be relevant also to shew, that early on the day of the meeting, in a spot at some distance from the place of meeting, (from which very spot a body of men came afterwards to the place of meeting,) a great number of persons, so organized, had assembled, and had there conducted themselves in a disloyal, riotous, or seditious manner. (2) Further, it would be relevant, on such a trial, to produce in evidence certain resolutions, which had been proposed by one of the defendants, at a large assembly in another part of the country very recently held for the same professed object and purpose as were avowed by the meeting in question, and that the defendant acted at both meetings as president or chairman; in a question of intention, as this is, it is most clearly relevant to

(1) *Rex v. Hunt*, 3 Barn. & Ald. 566, 577.

(2) *Rex v. Hunt*, 3 Barn. & Ald. 573, 574.

shew against that individual, that at a similiar meeting, held for an object professedly similar, such matters had passed under his immediate auspices. (1)

Upon trials of indictments for offences involving a charge of conspiracy, much evidence is usually produced, which does not relate to the particular conduct of a prisoner. Such evidence, however, is not necessarily of a presumptive nature. Thus it is usual to give general evidence of a conspiracy, previously to showing the connection of the prisoner with it. (2) It has been seen, in treating of hearsay evidence, that the acts and declarations of other conspirators in the absence of the prisoner are admissible against him; (3) it has been seen also, in treating of admissions, that the prisoner may be affected by writings from other persons, which came into his custody before his apprehension. In these cases the evidence is of a direct nature, applying to the acts in furtherance of a conspiracy and not circumstantial, as proving only collateral circumstances from which these acts are to be inferred.

It would not be allowable to shew, on the trial of an indictment, that the prisoner has a general disposition to commit the same kind of offence as that charged against him. Thus, in a prosecution for an infamous crime, an admission by the prisoner, that he had committed such an offence at another time, and with another person, and that he had a tendency to such practices, ought not to be received in evidence. (4)

General disposition.

As, in trials for conspiracies, whatever the prisoner may have done or said, at any meeting alleged to have been held in pursuance of the conspiracy, is admissible in evidence against him, on the part of the prosecution; so, on the other hand, any other part of his conduct at the same meetings, will be allowed to be proved on his behalf; for the intention and design of the party, at a particular time, are best explained by a complete view of every

Acts and declarations of prisoner when evidence for him.

(1) *Rex v. Hunt*, 3 Barn. & Ald. 568, 572.

(3) *Vide supra*, p. 210.

(2) *The Queen's case*, 2 B. & B. 302, and *State Trials*, *passim*.

(4) *Rex v. Cole*, Mich. Term, 1810, by all the Judges, MS.

part of his conduct at that time, and not merely from the proof of a single and insulated act or declaration. In the case of *Walker* and others, (1) who were tried for a conspiracy to overthrow the government, evidence having been produced, on the part of the prosecution, to shew that the conspiracy existed and was brought into overt-act at meetings in the presence of Walker, the counsel for the prisoners were allowed to ask a witness, whether, at any of these times, he had ever heard Walker utter any word inconsistent with the duty of a good subject? The question was opposed, but held by Mr. Justice Heath to be admissible. The prisoner's counsel were also allowed, in the same case, to inquire into the general declarations of the prisoner at those meetings; as, whether the witness had heard him say any thing that had a tendency to disturb the peace of the kingdom: and questions to the same effect were put to many other witnesses in succession.

Part of the transaction proved against him.

The question, in the case last cited, was expressly confined, and so required by the Court to be, to the conduct of the prisoner at those particular meetings, which had been previously inquired into on the part of the prosecution. Proof of what the prisoner might have said or done at other meetings, or at other times, unconnected with the transactions proved against him, would not have been admissible evidence in his favour. In *Lord George Gordon's* case, (2) a witness was asked, by the prisoner's counsel on cross-examination, as to a statement made by the prisoner, on the night before a meeting in St. George's Fields, and with respect to which meeting much evidence had been produced. This was objected to; and the Court decided, that the question was not regular. Lord Mansfield held, that as the counsel for the crown had given evidence of what the prisoner said at the meeting upon the 29th May, the counsel for the prisoner might shew the whole connection of what the prisoner said besides at that meeting; but that they could not go into evidence of what he said on the antecedent day. And in *Hanson's* case, (3) on a charge for promoting a riot, the counsel for

(1) 23 Howell, 1131, and see 31 Howell's St. Tr. 43.

(2) 21 Howell's St. Tr. 542.

(3) 31 Howell's St. Tr. 4281.



the prisoner was not allowed to prove what he had said privately to a friend, previously to his going to the place of riot, respecting his motive in going thither. Many other cases might be cited to the same effect.

The rule, on this subject, appears to have been extended much beyond the line here laid down, on the trial of *Horne Tooke*. (1) In that case, several publications were given in evidence, on the part of the crown, containing, as was alleged, republican opinions, which had been distributed by the prisoner during the period assigned for the existence of the conspiracy; and this evidence was much relied on, as shewing that the notion of a reform, which was expected to be set up by the prisoner in his defence, was a mere pretext to cover treasonable designs: to repel this conclusion, the counsel for the prisoner offered in evidence a book, which had been written by the prisoner twelve years before, on the subject of parliamentary reform; the evidence was objected to, as having no relation with the particular transaction in question, and because the prisoner's opinions, whatever they were formerly, might have afterwards changed. But the Lord Chief Justice Eyre said, that the question was not whether this book had a reference to the conspiracy charged, but whether it had not reference to the proof given in support of the charge: and he thought it evidence to rebut the supposition, that the reform of parliament was a pretence made by the prisoner. The book was accordingly received in evidence. There is great authority, however, for doubting, whether such evidence would, on revision, be considered strictly admissible. (2) It seems, indeed, reasonable, if some other acts of the prisoner, besides those charged in the indictment, are proved against him for the purpose of shewing his design in

H. Tooke's  
case.

(1) 1 East's P. C. 61, Gurney's Report, vol. ii. 36. 25 Howell's St. Tr. 345, S. C.

(2) See the observations on this point by Lord Ellenborough, C. J., in *Rex v. Lambert and Perry*, 31 Howell's St. Tr. 355, S. C. 2 Campb. N. P. C. 400. In that case, which was on the trial of an

information for a libel in a newspaper, it was held that the defendant had a right to have read in evidence any extract from the same paper connected with the subject charged as libellous, although disjoined from it by extraneous matter, and printed in a different character.

the affair in question, that he should be allowed to explain those acts by proof of other *contemporaneous* particulars of his conduct, which shew that he had a different design from that imputed to him. But this limitation (namely, that such other particulars, offered in evidence by the prisoner, ought to be contemporaneous with those proved on the other side, or at least confined within the same limits to which the evidence on the part of the prosecution is subject,) appears to be just and necessary; for, otherwise, the prisoner would be at liberty to take the whole range of his life, in the course of which his character and his designs may have undergone a complete change.

Hardy's case.

In *Hardy's* case, (1) great liberty was allowed to the counsel for the prisoner, in examining into particulars of his conduct, even into his speculative opinions; and perhaps it may be questionable, whether the rule was not carried to its utmost extent in that case. The question there put to the witness was this; whether, from his personal acquaintance with the prisoner, he had ever heard him state what was his plan of reform? The question was objected to. The overt-act charged was, that the prisoner, for the purpose of accomplishing the treason of compassing the king's death, did conspire with others to call a convention of the people, in order that the convention might depose the king; and the counsel for the prisoner submitted, that for the purpose of shewing that the convention was intended to be held, not with the design imputed by the indictment, but with an innocent design, they might go into evidence of what the prisoner had at other times declared, inasmuch as the counsel for the prosecution had gone into all that the prisoner had, at any part of his life, declared touching this fact, and had gone also into evidence of what other members of the corresponding societies had said. They then defended the question by an able argument, in the course of which several cases were

Lord Russell's case.

(1) 24 Howell's State Trials, 1065 p. 31, and 31 Howell's St. Tr. 189, —1093. See trial of O'Coigly and 310.  
O'Connor, 27 Howell's State Trials,

cited from the state trials; particularly the case of Lord Russell, the one which came nearest in principle to that under discussion, where the charge against the prisoner was for compassing the king's death, and the overt-act was, consulting to raise rebellion and seize the king's guards; and Lord Russell, in his defence, called many witnesses to speak to his affection towards the government, and his detestation of risings against it; some of the witnesses gave evidence of his conversations and sentiments on this subject, shewing his aversion to all risings of the people: Dr. Burnet and Dr. Cox, in particular, spoke fully to this point, and without any objection either from the Court or from the counsel for the prosecution. After the question in *Hardy's* case had been argued at some length, Lord Chief Justice Eyre is reported to have thus addressed himself to the prisoner's counsel, (1) "I do not know whether you can be content to acquiesce in the opinion that we are inclined to form upon the subject, in which we go a certain way with you. Nothing is so clear, as that all declarations which apply to facts, and even apply to the particular case that is charged, though the intent should make a part of that charge, are evidence against a prisoner, and are not evidence for him, because the presumption, upon which declarations are evidence, is, that no man would declare any thing against himself, unless it were true; but that every man, if he were in difficulty, or in apprehension of any difficulty, would make declarations for himself. Those declarations, if offered as evidence, would be offered, therefore, upon no ground which entitles them to credit. That is the general rule. But if the question be, what was the political speculative opinion which this man entertained touching a reform of parliament, I believe we all think that opinion may very well be learned and discovered by the conversations which he has held at any time or in any place." The question afterwards put to the witness was, whether, before the time of the convention which was imputed to the prisoner, he had ever heard from him what his objects were, and whether he had at all mixed himself in

(1) 24 Howell's St. Tr. 1094.

that business ; and, in answer, the witness stated what he had heard from the prisoner respecting his plan of reform. (1)

Irrelevancy in  
examinations.

With respect to questions for the purpose of making a proper presumption as to the probability of a witness speaking the truth and without bias, it is to be observed, that they have a more obvious tendency to lead to irrelevant inquiries, than those which have been the subject of consideration ; they have consequently occasioned distinct rules being established in regard to them. These rules will be considered in the third part of this Work.

Irrelevancy  
with regard to  
pleadings.

Besides the ground for rejecting evidence on account of the presumptions, to be derived from, it being too remote from the subject of inquiry, there is another ground for its rejection on account of irrelevancy, *viz.* that the pleadings in the cause do not admit of its being received. The cases upon this extensive subject have turned more upon the effect of particular pleadings, than upon the general principles of evidence.

(1) 24 Howell's St. Tr. p. 1097. Another question, which is stated to have been put by the prisoner's counsel to one of the witnesses, and allowed to be answered, was, as to

what the prisoner had declared to be the object of the corresponding societies. This question was not opposed. *Ibid.* p. 1101.

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